No.

In The

Supreme Court of the United States

October Term, 1993

THE CELOTEX CORPORATION,

Petitioner,

v.

BENNIE EDWARDS and JOANN EDWARDS,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Will the Court, in its certiorari discretion, review *Edwards v. Armstrong World Industries, Inc., et al.*, 6 F.3rd 312 (5th Cir. 1993), which affirmed the district court's (Northern District of Texas) May 27, 1992 order?

Stated otherwise, at the present time, are there special and important reasons for the Court to exercise its certiorari jurisdiction, because:

1) the Fifth Circuit has rendered a decision in direct conflict with the decision of the Fourth Circuit on the same matter in *Willis v. The Celotex Corporation*, 978 F.2d 146 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 1846 (1993); and,

2) the Fifth Circuit has demonstrated an apparent departure from the accepted and usual course of judicial proceedings in affirming the Northern District of Texas district court's May 27, 1992 order, which order collaterally attacks an order entered by the United States Bankruptcy Court for the Middle District of Florida.

LIST OF PARTIES

The parties to the proceedings below are identified in the caption of the case. The Celotex Corporation ("Celotex") is wholly-owned by Jim Walter Corporation and, Celotex has a wholly-owned subsidiary, Carey Canada Inc. Although not formally named as a party in the proceedings below, Northbrook Property and Casualty Insurance Company ("Northbrook") has an interest in the outcome of this petition because Northbrook is the surety on the supersedeas bond posted by Celotex which is at issue and is the surety on like bonds in similar cases.

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Edwards, 6 F.3d at 321, App. 21: the Fifth Circuit's order denying Celotex' petition for rehearing, yet offering "a few explanatory words," stating that "we have not held that the bankruptcy court in Florida was necessarily wrong." *Id.*

JURISDICTION

The Court's jurisdiction is invoked pursuant to 28 U.S.C. §§ 1254(1) and 1651. The jurisdication of the district court was properly invoked pursuant to 28 U.S.C. § 1332. On November 5, 1993, the Fifth Circuit entered its order affirming the district court. On December 22, 1993, the Fifth Circuit entered its order denying Celotex' petition for rehearing.

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES INVOLVED

The issues presented by this petition generally implicate Articles I and III of the Constitution of the United

States, relating to the constitutional basis for, and the powers of, the bankruptcy courts, and title 11 of the United States Code, including the following specific provisions:

> **U.S. Const. art. I, § 8, cl. 4:** The Congress shall have Power . . . To establish . . . uniform Laws on the subject of Bankruptcies throughout the United States.
>
> **U.S. Const. art. III, § 1:** The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.
>
> **11 U.S.C. § 105(a):** The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.
>
> **28 U.S.C. § 157(a):** Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district. . . .
>
> **28 U.S.C. § 158(a):** The district courts . . . shall have jurisdiction to hear appeals from final judgments, orders, and decrees, and, with leave of the court, from interlocutory orders and decrees, of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title [28 U.S.C. § 157]. An appeal under this subsection shall be taken only to the district court for the judicial district in which the bankruptcy judge is serving.
>
> **28 U.S.C. § 158(d):** The court of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and decrees entered under subsections (a) and (b) of this section.
>
> **65.1 Fed.R.Civ.P.:** Whenever these rules, including the supplemental rules for Certain Admiralty and Maritime Claims, require or permit the giving of security by a party, and security is given in the form of a bond or stipulation or other undertaking with one or more sureties, each surety submits to the jurisdiction of the court and irrevocably appoints the clerk of the court as the surety's agent upon whom any papers affecting the surety's liability on the bond or undertaking may be served. The surety's liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court, who shall forthwith mail copies to the sureties if their addresses are known.

STATEMENT OF THE CASE

This case involves a collision between the antithetical litigation philosophies that have fueled the "asbestos mess"[1] and the bankruptcy philosophies that are manifest

[1] The term used by the Judicial Panel on Multidistrict Litigation aptly describing the pending federal district court

in the utilization of a temporary stay as a case management control mechanism by the bankruptcy court charged by Congress to administer the reorganization case of Celotex, a defendant of asbestos-related mass tort claims.

A. Pre-bankruptcy proceedings

On April 17, 1989, the district court entered a $281,025.80 judgment (including interest) against petitioner, Celotex, and in favor of respondents, Bennie and Joann Edwards (the "Edwards") for asbestos related injuries. *Edwards*, 6 F.3d at 314. This judgment is for $245,000 in punitive damages, compensatory damages being only $35,253.80. Judgment, App. 24.

To stay execution pending appeal, Celotex, as principal, and Northbrook, as surety, posted a supersedeas bond in the amount of $294,987.88. *Edwards*, 6 F.3d at 314. Northbrook acted as surety pursuant to a settlement agreement with Celotex resolving insurance coverage disputes and secured its obligation under the bond with insurance proceeds remaining to be paid to Celotex under the agreement. *Id.*

On September 20, 1990, the Fifth Circuit affirmed the district court's judgment. *Id.* The mandate issued on October 12, 1990. *Id.*

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actions involving allegations of personal injury or wrongful death caused by asbestos in its opinion and order in *In re Asbestos Products Liability Litigation (No. VI)*, 771 F. Supp. 415, 424 (J.P.M.L. 1991).

B. Proceedings in the bankruptcy court

That same day, October 12, 1990, Celotex and its wholly owned subsidiary, Carey Canada Inc. (the "Debtors"), filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code, 11 U.S.C. §§ 1101-1129 in the United States Bankruptcy Court for the Middle District of Florida, Tampa Division. On October 17, 1990, to augment the automatic stay protection afforded the Debtors under 11 U.S.C. § 362(a), the bankruptcy court entered a stay under Bankruptcy Code 11 U.S.C. § 105(a), ordering that:

> [a]ll persons . . . be and each of them are hereby stayed, restrained and enjoined from:
>
> . . . .
>
> f. Taking any act to collect, assess, or recover a claim against any of the Debtors that arose before the commencement of the Chapter 11 cases . . .
>
> . . . .
>
> 3. Notwithstanding any exceptions or limitations to the automatic stay contained in § 362(b) of the Code, all Entities are hereby jointly and severally stayed, restrained and enjoined from commencing or continuing any judicial, administrative or other proceeding involving any of the Debtors regardless of (a) who initiated the proceeding, (b) whether the matter is on appeal and supersedeas bond has been posted by the Debtors or (c) the appellant in an appeal is one of the Debtors.
>
> 4. On request of a party in interest, and after not less than thirty (30) days' written notice to the attorneys for the Debtors, and after a hearing, this Court may consider granting

> relief from the restraints imposed herein in the event that it be deemed necessary, appropriate and warranted to so terminate, annul, modify or condition. . . .

App. 26.

The § 105(a) stay was entered for the purpose of precluding, among other things, judgment creditors from proceeding in various state and federal courts against supersedeas bonds posted by the Debtors without first coming before the bankruptcy court. *Matter of Celotex Corp.*, 128 B.R. 478 (Bankr. M.D. Fla. 1991). App. 30.

On June 13, 1991, the bankruptcy court entered its Omnibus Order On Motion To Lift Stay With Regard to Celotex Appeals And To Release Supersedeas Bonds Thereon, *Celotex*, 128 B.R. 478. Thereby, the bankruptcy court affirmed the § 105(a) stay, finding that Second, Fourth and Fifth Circuit decisions support the bankruptcy court's authority "to stop ongoing litigation and to prevent peripheral court decisions from dealing with issues, properties, or entities involved in a debtor's reorganization process without first allowing the bankruptcy court to have an opportunity to review the potential effect on the debtor." *Id.* at 484. The bankruptcy court stated:

> The federal courts of appeals, upon viewing injunctions granted during pandemic tort-bankruptcy cases such as this have consistently understood these circumstances ***and have endorsed the jurisdiction*** and utilization of a stay as a case management control mechanism . . . . Where bankruptcy courts in "mega" cases such as this are required to deal with complex litigation involving numerous parties, joint and several liability, and multi-million dollars in claims and assets, not to mention potential conflicts with other judicial determinations, the powers of the bankruptcy court under Section 105 must in the initial stage be absolute, unless limited by the Bankruptcy Code or other federal laws. Clearly, the role of Section 105 in this type of case is first to protect the reorganization process.

Id. at 483-484 (emphasis added).

Addressing the point that has now become the crux of this petition, the bankruptcy court wrote:

> As to the utilization of Section 105 vis-a-vis the supersedeas bonds, ***once the judgment creditor has been successful throughout the appellate process,*** the judgment creditor is not able to proceed against the supersedeas bond without seeking to vacate the Section 105 stay in this Court. Under these circumstances, it will be Debtor's burden to establish that the Section 105 stay should continue. The Court's inquiry will include Debtor's ability to avoid any final judgment under the Bankruptcy Code and the necessity to protect its sureties or disenfranchise them if such surety agreements can be considered executory contracts or avoided under the avoiding powers in the Bankruptcy Code. (11 U.S.C. §§ 365, 547, and 548.) Additionally, consideration will be given to Debtor's ability to deal with the targeted litigation within the reorganization plan and the effect on that process if the Section 105 stay is extinguished. ***The analysis may also include the treatment of those judgments which include punitive damages*** (footnote described below). . . .

Accordingly, it is

ORDERED . . . that:

. . . .

> 3. Where at the time of filing the petition, the appellate process between Debtor and the judgment creditor had been concluded, the judgment creditor is precluded from proceeding against any supersedeas bond posted by Debtor without first seeking to vacate the Section 105 stay entered by this Court. . . .

Id. at 484-85 (emphasis added).

The bankruptcy judge dropped a footnote, explaining that:

> Section 726(a)(4) of the Bankruptcy Code provides that punitive damages are fourth in line for distribution in a Chapter 7 liquidation. Although Section 726(a)(4) is inapplicable to Chapter 11 reorganizations (citations omitted), it is well-established that bankruptcy courts have inherent equitable power to disallow, limit, or subordinate claims for punitive damages in Chapter 11 reorganizations. (citations omitted).

Id. at 484 n. 12.

On May 28, 1992 the bankruptcy court entered its Order On Motions For Relief From Section 105 Stay, *Matter of Celotex Corp.*, 140 B.R. 912 (Bankr. M.D. Fla. 1992), App. 47, in which the bankruptcy court denied motions to lift the § 105(a) stay to allow judgment creditors to proceed against their respective supersedeas bonds. Again, the court expressly extended the stay to the sureties on such bonds finding:

> [d]issolving the Section 105 stay would merely shift the battleground: if the Section 105 stay were lifted to enable the judgment creditors to reach the sureties, the sureties in turn would seek to lift the Section 105 stay to reach Debtor's collateral, with corresponding actions by Debtor to preserve its rights under the settlement agreements. Such a scenario could completely destroy any chance of resolving the prolonged insurance coverage disputes currently being adjudicated in this Court. The settlement of the insurance coverage disputes with all of the Debtor's insurers may well be the linchpin of Debtor's formulation of a feasible plan [footnote omitted]. Absent the confirmation of a feasible plan, Debtor may be liquidated or cease to exist after a carrion feast by the victors in a race to the courthouse.

Id. at 915.

The bankruptcy court noted that "in a non-bankruptcy context, [the judgment creditors] would be entitled to have their judgments satisfied", but found that "any possible harm . . . can be minimized through the establishment of an adequate protection mechanism." *Id.* Accordingly, the bankruptcy court ordered, among other things, that the Debtors provide adequate protection to the supersedeas bond judgment creditors and ordered the Debtors to commence within 60 days, if at all, a preference action, fraudulent transfer action or any other action to avoid or subordinate the judgment creditors' claims, such as the Edwards' punitive damages award. Debtors fully complied with all adequate protection requirements of the bankruptcy court and timely filed an action against the Edwards and similarly situated judgment creditors.

C. The district court's May 27, 1992 Fed.R.Civ.P. 65.1 execution order

Despite Northbrook's and Celotex' objections that the Edwards' Rule 65.1 motion to enforce the supersedeas bond was filed absent modification of the § 105(a) stay, the district court entered its order granting release of the bond. App. 23.

D. The Fifth Circuit affirms the execution order

Stating that "[t]he threshold question in this appeal is whether the district court had jurisdiction to determine the applicability of the bankruptcy court's stay", *Edwards*, 6 F.3d at 315, and then sharpening the issue "to the question of whether prudential (or other) considerations justify extending the bankruptcy court's jurisdiction to the point where it includes the power to stay the proceedings in question here," *Id.* at 319, the Fifth Circuit affirmed the district court's order that "plaintiffs may execute. . . . " *Id.* at 321.

However, in its *rehearing denied* order, the Fifth Circuit offered "[a] few explanatory words." *Id.* at 321. The court rejected Celotex' argument that the Northern District of Texas and the Fifth Circuit are not permitted to collaterally attack the bankruptcy court's order, the court positing two points as its rationale for rejecting its collateral attack problem. First, "the bankruptcy court's order does not purport to reach the proceedings in this case and therefore executing the supersedeas bond does not infringe the Eleventh Circuit's proper jurisdiction." *Id.* Second, the Fifth Circuit stated that its "opinion merely

declares this court's power to protect and preserve supersedeas bonds posted in our district courts. Thus, we have not held that the bankruptcy court in Florida was necessarily wrong; we have only concluded that the district court over which we do have appellate jurisdiction was right." *Id.*

REASONS FOR GRANTING THE WRIT

The Fifth Circuit's decision departs from SUP.CT.R. 10's accepted and usual course of judicial proceedings because:

1. it directly conflicts with *Willis v. The Celotex Corporation*, 978 F.2d 146 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 1846 (1993); and

2. the Fifth Circuit sanctioned a collateral attack against the bankruptcy court's § 105(a) stay, creating a serious problem for judicial administration.

The Court's power of supervision is particularly implicated because the Fifth Circuit's decision and opinion undermines the orderly process of bankruptcy cases. Appropriate review of orders of bankruptcy judges charged by Congress with the unique business of restructuring debtor-creditor relationships is by direct appeal. This is particularly important in multidistrict massive toxic tort litigation scenarios where the interests of countless asbestos injury claimants seeking a fair share of available assets must be balanced against other asbestos injury claimants who seek preferred payment because

they hold judgments for punitive damages and a supersedeas bond has been posted.

I. The Fifth Circuit's Decision Conflicts With The Fourth Circuit On Identical Facts

In *Willis*, 978 F.2d 146, the Fourth Circuit recognized that § 105(a) permits the bankruptcy court to "issue any order . . . that is necessary or appropriate to carry out the provisions" of the Bankruptcy Code. The *Willis* court followed its earlier decision in another bankruptcy case caused by massive toxic tort litigation, *A.H. Robins Co. v. Piccinin (In re A.H. Robins Co.)*, 788 F.2d 994, 1003 (4th Cir.), *cert. denied*, 479 U.S. 876, 107 S.Ct. 251 (1986). As much as the Article III judiciary and anyone else associated with the dispensation of justice might not relish the prospect of personal injury judgment creditors being stayed by Article I adjunct judges, Congress established the United States Bankruptcy Court to, *inter alia*, resuscitate worthy debtors and, in the process, granted bankruptcy judges the power to temporarily stay creditors in their executions if such is necessary for administration of Chapter 11 estates.

Edwards conflicts with *Willis*. The conflict is most compelling for several reasons. Celotex is the judgment debtor in both cases and has the same counsel. Respondents' counsel are also the personal injury judgment creditor's counsel in *Willis*. Celotex secured its supersedeas bond obligation[2] in *Willis* with its own assets (certificates

[2] As a purely technical matter, the supersedeas bond obligor is the principal, in this case, Celotex. *See* Fed.R.Civ.P. 62(d): "When an appeal is taken the appellant by giving a supersedeas bond may obtain a stay. . . . " The appellant, as principal obligor on the bond, may secure or collateralize his bond by depositing money or other property in the court's registry. Usually, the court utilizes state court rules providing that the court's clerk will file the judgment debtor's bond when he provides adequate security, *e.g.*, a surety in good standing. Before accepting the obligation under the supersedeas bond, the surety requires proper collateral from the principal.

of deposit, 978 F.2d at 148), just as Celotex secured the Edwards bond with its own assets (settlement receivables from the surety that was also one of its liability carriers, *Edwards*, 6 F.3d at 314). These two cases create a deep and intolerable conflict, the *Willis* judgment creditors being relegated to moving to vacate the stay in the bankruptcy court, with appellate rights within the Eleventh Circuit, while the *Edwards* judgment creditors were permitted to collaterally attack the bankruptcy court's order in an Article III forum other than one permitted by law. 28 U.S.C. § 158(a).[3]

The Fourth Circuit recognized that the Celotex bankruptcy and supersedeas bonds associated with that case are quite different from the "usual bankruptcy" where "third-party payments on a supersedeas bond securing a judgment owned by the bankrupt would not affect reorganization. . . . " *Willis*, 978 F.2d at 149. The court agreed that "immediate execution against sureties on the supersedeas bonds would have been detrimental to Celotex' ability to formulate a plan of reorganization." *Id.* at 149-150.

[3] *Supra*, p.2.

As discussed later in this petition, the only criticism of the Fourth Circuit's opinion is that it was not within the province of Article III courts in the Fourth Circuit to so much as consider whether the bankruptcy judge acted "improperly in enjoining execution on supersedeas bonds." *Id.* at 150. The Article III judiciary reaches that question in only one instance: when, after the judgment creditor is unsuccessful in a motion to lift the § 105(a) stay entered by the bankruptcy court, the creditor appeals to the district court of which the bankruptcy court is an adjunct, thence to the circuit court of appeals that exercises appellate jurisdiction over the district court. *See* 28 U.S.C. § 158(a) and (d).[4]

In any event, the Fourth Circuit correctly vacated the execution order of its district court in Virginia and remanded "for further proceedings at such time as the bankruptcy court lifts the § 105(a) stay." *Willis*, 978 F.2d at 150.

The Fourth Circuit acknowledged the bankruptcy principles that enable a debtor making transfers of assets prior to filing a bankruptcy petition to avoid those transfers stating "[W]e assume that once the bankruptcy court has had an opportunity to evaluate whether any portion of Willis' judgment is voidable, it will lift the stay." *Willis* at 978 F.2d at 149 n. 5. The transfer of assets by Celotex to secure the posting of the supersedeas bond for the benefit of the Edwards, and bonds for others similarly situated, has been challenged by Celotex for the benefit of all creditors as avoidable under the Bankruptcy Code.

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[4] *Supra*, pp.2-3.

The bankruptcy court was correct, *Celotex*, 128 B.R. at 484 n. 12, in holding that it has "inherent equitable power to disallow, limit, or subordinate claims for *punitive damages* in Chapter 11 reorganizations." A bankruptcy court sits as a court of equity and can look behind a judgment to determine the essential nature of the liability for purposes of proof and allowance. *See Pepper v. Litton*, 308 U.S. 395, 60 S.Ct. 238 (1939). The Fifth Circuit incorrectly held that it must act to place limits on the equitable power of bankruptcy courts. *Edwards*, 6 F.3d at 319.[5]

The bankruptcy court's application of these equitable principles to preserve the status quo was hardly novel. *See In re A. H. Robins Co., Inc.*, 89 B.R. 555, 561 (E.D. Va. 1988); *In re Johns-Manville Corp.*, 68 B.R. 618 (Bankr. S.D.N.Y. 1988).

Such describes the conflict between Celotex' asbestos-related creditors, who will realize diminished shares of remaining assets in the bankruptcy case, and creditors like the Edwards, whose claims arise from the same asbestos-related problem, who seek payment in full

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[5] To make matters worse, the Fifth Circuit mistakenly relied on *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 80-81, 102 S.Ct. 2858, 2876 (1982), for its conclusion in that regard. *Northern Pipeline* decided only that a bankruptcy court did not have jurisdiction to try common law actions, as distinguished from such statutory actions that might be assigned by Congress. *Northern Pipeline* was not about equity at all, and it certainly was not about § 105 stays that are entered by bankruptcy courts to preserve the integrity of a bankruptcy estate.

of those claims, including disproportionate punitive damage amounts. The bankruptcy court dealt with this conflict in the administration of the Celotex Debtors' estates by preserving the status quo.

The Fifth Circuit's decision, on all fours with *Willis*, is in direct conflict with the Fourth Circuit.

II. Collateral Attacks On Orders In Other Circuits Are Impermissible

The bankruptcy court has the authority to determine its own jurisdiction and its determination, while open to direct review within the Eleventh Circuit, may not be assailed collaterally by the Fifth Circuit. *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 377 (1940).

Assuming *arguendo* that the bankruptcy court is totally wrong in its approach to the management of the Celotex bankruptcy case and should not or may not disallow huge punitive damage awards to personal injury creditors at the expense of compensating other personal injury creditors, such is remedied by appealing its decision within the Eleventh Circuit. In the last analysis, this Court's certiorari process on the merits is available. In this case, the Edwards' counsel *did* appear before the bankruptcy court, and lost. *Celotex*, 128 B.R. 478. Rather than obtain relief from the district court in Florida, counsel chose to forum shop in Texas.

The Fifth Circuit has ignored the accepted and usual course of judicial proceedings, bypassing the bankruptcy court's order that directs asbestos injury claimants with

claims against Celotex to apply for modification of the § 105(a) stay; also bypassing 28 U.S.C. § 158(a).[6]

The Edwards are entitled to appeal the bankruptcy court's order within the Eleventh Circuit, but not by collaterally attacking that order in the Fourth, Fifth or any other circuit. In the present case, the Fifth Circuit reaches its conclusion by an inapposite analysis about the supersedeas bond itself: first, the court notes that the § 105(a) stay order "does not, on its face, reach to third parties" *Edwards*, 6 F.3d at 318; second, the supersedeas surety, Northbrook Property and Casualty Insurance Company, "does not appear to be included on the face of the stay" *Id.*; third, *Northern Pipeline* justifies the court's "placing definite limits on the equity powers of bankruptcy courts" *Id.* at 319; and, finally, "section 105 simply does not give bankruptcy courts authority over assets that are not property of the debtor's estate and in which the debtor has no interest." *Id.* While much of this analysis is simply wrong, those issues are for another day. It is for the Eleventh Circuit to decide whether the bankruptcy court's § 105(a) stay is overbroad. 28 U.S.C. § 158(d).

There were more than 141,000 asbestos-related personal injury claims, and over $70,000,000 in supersedeas bonds involving more than 100 bonded appeals, pending against Debtors when they filed for protection under Chapter 11 of the Bankruptcy Code. *Celotex*, 128 B.R. at 479; *Edwards*, 6 F.3d at 318. Obviously, the Celotex bankruptcy case does not present the typical debtor-creditor

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[6] *Supra*, p.2.

relationship. The intertwining of (a) Celotex supersedeas bonds, wherever posted, (b) the assets transferred by Celotex to sureties to obtain supersedeas bonds, and (c) Celotex' bankruptcy estate is absolutely clear. The bankruptcy court wrote:

> Debtor, in all instances, has collateralized the supersedeas bonds. The collateral has taken various forms, but one type in particular is illustrative of the linkage associated with irreparable harm. Debtor and many of its insurers on asbestos claims have settled long-ongoing disputes over insurance coverage. Some of these settlement agreements established the maximum amount of insurance coverage, provided for payment to Debtor of these coverage amounts over time, *and provided such payments and contract rights could be held by the insurance company as collateral for supersedeas bonds issued on behalf of Debtor in some of the asbestos cases. . . .*

Celotex, 140 B.R. at 914-15 (emphasis added).

The Fifth Circuit is incorrect in its writing that the bankruptcy court's order does not reach the workings or "proceedings" of the Northern District of Texas. Certainly, neither § 105 nor any decisional authority permits a bankruptcy court to order matters in a trial court, federal or state. However, the bankruptcy court's omnibus § 105(a) stay is directed to any judgment creditor of Celotex seeking to collect the judgment. *Celotex*, 128 B.R. at 478. As a matter of judicial administration, state and federal trial courts that administratively close or suspend pending matters involving debtors when comfronted with a bankruptcy court stay order are now told

by the Fifth Circuit that parties' ignoring such orders is appropriate.

The result in this particular case is that the district court has entered its order, and would in all likelihood enforce that order by directing the marshal to seize the surety's assets. The problem is that the surety wrote the bond only because Celotex posted collateral. That collateral is property of the Celotex bankruptcy estate.[7] *Celotex*, 128 B.R. at 481; *Celotex*, 140 B.R. at 915. Under the guise of a Rule 65.1 execution order, the district court wrongly exercised its jurisdiction to effectuate a preference in favor of respondents *vis a vis* other asbestos creditors.[8] Fed.R.Civ.P. 65.1 does not constitute either a new cause of action or a remedy. Rather, it provides a forum for execution without the necessity of the judgment creditor's commencing a new lawsuit to claim entry of judgment against the surety, enabling him to execute. Rule 65.1 is not designed to overcome such orders as the bankruptcy court enters for purposes of the Bankruptcy Code.

The Fifth Circuit's statement that it "merely declares this court's power to protect and preserve supersedeas bonds posted in our district courts", *Edwards*, 6 F.3d at

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[7] The bankruptcy court fully explained the mechanism of Celotex utilizing its insurance proceeds to collateralize the supersedeas bonds. "Northbrook, also Celotex' insurer, secured [its] participation in the bond using insurance proceeds remaining to be paid to Celotex under a settlement agreement resolving coverage disputes between Northbrook and Celotex." *Celotex*, 140 B.R. at 915.

[8] The upshot of its opinion is that district court judges in Texas have jurisdiction to perform the Middle District of Florida's bankruptcy business.

321, encourages forum shopping, not to mention the flawed premise. There is no showing of a need for the court's "protection and preservation" of bonds posted in any district court.

The Fifth Circuit's reasoning and statements have an unsuspected harmful effect. In the court's section III about *11 U.S.C. § 362(a) automatic stays*, the court wrote that *§ 362(a)* "limits the bankruptcy court to stays in only those proceedings in which the debtor or his . . . property is in controversy." *Edwards*, 6 F.3d at 316.[9]

Next, the court observes that the *§ 362(a) stay* is not applicable to preclude actions against the surety. *Id.* at 317. Then, in its section IV discussion about *§ 105*, the court, perhaps forgetfully, states that it has "shown" in section III that the debtor's property cannot be *"extended to include the separate obligations of a non-bankrupt surety."* *Id.* at 318. Overlooking the regrettable syntax and the fact that property is not "extended", the court has effected a colossal *non sequitur*. Of course, a perfectly good argument is made that the *§ 362(a) automatic stay* does not preclude suits against supersedeas bond sureties, the reason being that sureties' assets are not the debtors' assets. But, in this case, the particular surety's obligation is collateralized by Celotex' assets. This is precisely the

[9] It is patently incorrect for the court to state that § 362(a) "limits the bankruptcy court." Section 362(a) operates as an *automatic stay* of many proceedings, including court actions. This statute contains no "limits" that the bankruptcy court must observe. The "limits" apply to parties in other court cases, state and federal.

reason why the bankruptcy court entered its § 105(a) stay order.

Finally, Celotex emphasizes that the Court is not faced at this point with a global approach to the Bankruptcy Code's § 105 and the equity powers of the bankruptcy court. If there is to be such an analysis, it is appropriately addressed if and when the Eleventh Circuit is presented with the bankruptcy court's § 105(a) stay. For now, the question is whether any court outside the Eleventh Circuit has jurisdiction to order execution of supersedeas bonds in the face of the bankruptcy court's order to the contrary.

CONCLUSION

The Court should issue a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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APPENDIX

**Bennie EDWARDS and Joann Edwards,
Plaintiffs-Appellees,**

v.

**ARMSTRONG WORLD INDUSTRIES, INC., et al.,
Defendants,**

**The Celotex Corporation,
Defendant-Appellant.**

No. 92-1557.

United States Court of Appeals,
Fifth Circuit.

Nov. 5, 1993.

On Petition for Rehearing and Suggestion
for Rehearing En Banc Dec. 22, 1993.

In Chapter 11 case, bankruptcy court issued order staying all proceedings against debtor including proceedings where matter was on appeal and supersedeas bond had been posted by debtor. Judgment creditors in asbestos litigation moved in district court to enforce supersedeas bond against surety after debtor lost appeal for which bond was posted. The United States District Court for the Northern District of Texas, David O. Belew, Jr., J., granted execution against surety on bond. Debtor filed notice of appeal. The Court of Appeals, Goldberg, Circuit Judge, held that: (1) district court had jurisdiction to evaluate whether motion to execute on supersedeas bond fell under exclusive jurisdiction of bankruptcy court; (2) automatic stay provision of Bankruptcy Code could not be invoked to prevent judgment creditors from pursuing surety of supersedeas bond once debtor lost appeal for which bond was posted; and (3) equitable powers of bankruptcy court did not permit bankruptcy

court to enjoin judgment creditors from pursuing action to execute on supersedeas bond once debtor lost appeal for which bond was posted.

Affirmed.

Edith H. Jones, Circuit Judge, specially concurred and filed opinion.

See also 152 B.R. 667.

Kevin F. Risley, Butler & Binion, Houston, TX, Jeffrey W. Warren, Wendy V. E. England, Bush, Ross, Gardner, Warren & Rudy, Tampa, FL, for defendant-appellant.

Brent M. Rosenthal, Dallas, TX, for plaintiffs-appellees.

Appeal from the United States District Court for the Northern District of Texas.

Before POLITZ, Chief Judge, GOLDBERG and EDITH H. JONES, Circuit Judges.

GOLDBERG, Circuit Judge:

This case epitomizes the way that toxic tort litigation has corroded our judicial system. Here we have an asbestos poisoning dispute in which the defendant has sought the protection of the bankruptcy laws to shield itself from the multitude of claims generated by this one-time miracle fabric turned cancer-causing nightmare. To the bankruptcy court now falls the herculean task of managing the problems generated by the unprecedented magnitude of these disputes. It is this court's duty to insure that the case management tools the bankruptcy

court utilizes to control these conflicts do not overwhelm its primary obligation to dispense justice.

The precise question before us centers around the power of bankruptcy courts to stay proceedings pending in other courts which might have some effect on the ability of the bankruptcy judge to manage the estate. The Bankruptcy Code provides judges with those equitable powers essential to serving the twin aims of bankruptcy law; protecting the debtor from the tentacles of his or her creditors and, fair distribution of the estate. *See* H.R.Rep. No. 95-595, 95th Cong., 1st Sess. 340 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5963, 6296-97. We must decide what limits must be placed on the bankruptcy court's power to insure that both debtors and creditors remain adequately protected.

No usurpation is intended in this decision to denigrate the powers of the bankruptcy court, nor did we intend any trespass upon the metes and bounds of bankruptcy courts' treasured turfs. Indeed, neither side to this controversy has a perpetual lease or any tenure of ownership that is infrangible and indestructible. It is not a struggle between any potential usurpers. Instead, both the district court and the bankruptcy court should both use what they think are appropriate transits and calipers in surveying their jurisprudential turfs.

While cognizant of the repercussions that our opinion may have on other disputes, parties, etc., we should be careful to make decisions based only upon the merits of the particular cases before us. In the instant case, plaintiffs wish to execute a supersedeas bond against a non-bankrupt surety. Because the appeal for which the

bond was posted has terminated, the bankrupt and therefore also the bankruptcy court have lost any control over this asset. Consequently, we decline to extend the reach of the bankruptcy court's authority to stay these proceedings and we affirm the ruling of the district court in releasing the supersedeas bond to the plaintiffs.

I. Facts

In April of 1989, the United States District Court for the Northern District of Texas entered a $281,025.80 judgment in favor of Bennie and Joann Edwards and against the Celotex Corporation ("Celotex") for asbestos-related injuries. To stay execution on this judgment while pursuing an appeal, Celotex posted a supersedeas bond for $294,987.88. Northbrook Property and Casualty Insurance Company ("Northbrook") served as surety on the bond. Northbrook, also Celotex' insurer, secured their participation in the bond using insurance proceeds remaining to be paid to Celotex under a settlement agreement resolving coverage disputes between Northbrook and Celotex.

In an opinion issued on September 20, 1990, this court affirmed the plaintiff's judgment against Celotex. *Edwards v. Armstrong World Indus., Inc.*, 911 F.2d 1151 (5th Cir.1990). Celotex did not move for rehearing or a stay of the mandate and, on October 12, 1990, the mandate issued. That same day, Celotex filed a petition for relief under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Middle District of Florida.

The filing of Celotex' Chapter 11 petition automatically stayed the continuation of all "proceedings against

any of the Debtors" and the commencement of "any act to obtain possession of property of any of the Debtors." 11 U.S.C. §§ 362(a)(1) and (3). On October 17, 1990, the bankruptcy judge augmented the protection afforded the Debtors by the automatic stay, employing the broad equitable powers available to bankruptcy judges under 11 U.S.C. § 105. The bankruptcy judge issued an order staying all proceedings against Celotex, including those proceedings where "the matter is on appeal and a supersedeas bond has been posted by the Debtors."[1]

On May 3, 1991, the plaintiffs filed a motion in the district court seeking to enforce the supersedeas bond against Northbrook as surety on the bond. *See* Fed.R.Civ.P. 65.1.[2] Northbrook and Celotex opposed this

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[1] *See* Order Granting Emergency Motion for Determination of Applicability of § 362 Stay to Pending Matters Or, in the Alternative, for Extension of § 362 Stay Pending Matters. The pertinent section of this order reads: "3. Notwithstanding any exceptions or limitations to the automatic stay contained in § 362(b) of the Code, all Entities are hereby jointly and severally stayed, restrained and enjoined from commencing or continuing any judicial, administrative or other proceeding involving any of the Debtors regardless of (a) who initiated the proceeding, (b) whether the matter is on appeal and a supersedeas bond has been posted by the Debtors or (c) the appellant in an appeal is one of the Debtors."

[2] Federal Rule of Civil Procedure 65.1 states, "Whenever these rules . . . require or permit the giving of security by a party, and security is given in the form of a bond or stipulation or other undertaking with one or more sureties, each surety submits to the jurisdiction of the court and irrevocably appoints the clerk of the court as the surety's agent upon whom any papers affecting the surety's liability on the bond or undertaking may be served. The surety's liability may be enforced on motion without the necessity of an independent action."

motion, asserting that any proceeding to execute the bond was stayed by the Celotex bankruptcy.

However, let us be absolutely clear that the bankruptcy court's order does *not*, on its face, apply to the proceedings to execute the supersedeas bond against Northbrook. A careful reading of the bankruptcy court's order reveals that it forbids all proceedings or claims involving the *debtor,* and makes no reference to proceedings against third parties. Thus the section 105 stay would not, as written, prevent the district court form executing the bond against Northbrook.[3]

The district court entered the Bond Order on May 27, 1992 granting execution against Northbrook on the bond. Thereafter, Celotex filed its notice of appeal.

II. Jurisdiction

The threshold question in this appeal is whether the district court had jurisdiction to determine the applicability of the bankruptcy court's stay. Celotex argues that the district court lacked jurisdiction to consider the plaintiffs' motion to execute the supersedeas bond

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[3] As a relevant aside, we take note of the fact that the bankruptcy court in this case held that the stay as issued does apply to the proceedings in this case. *See In re Celotex Corp.*, 128 B.R. 478, 484 (Bankr.M.D.Fla.1991) ("[w]here bankruptcy courts in 'mega' cases such as this are required to deal with complex litigation involving numerous parties, joint and several liability, and multi-million dollars in claims and assets, not to mention potential conflicts with other judicial determinations, the powers of the bankruptcy court under Section 105 must in the initial stage be absolute.")

because the bankruptcy court in Florida, where Celotex' Chapter 11 case is pending, has exclusive jurisdiction over all issues related to the Bankruptcy. 28 U.S.C. § 1334(a) and (d). The difficulty underlying the determination of whether the district court had jurisdiction to hear the plaintiffs' motion is that this issue turns on the question of whether the bond is part of the Debtor's estate. However, this question is bound up in the merits of appellant's claim.

The jurisdictional grant of 28 U.S.C. § 1334(d) gives the bankruptcy court "exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case."[4] This jurisdictional grant is limited by section 1334(b) which provides that the bankruptcy court only has "original but not exclusive jurisdiction of all civil proceedings . . . *related to* cases under title 11." 28 U.S.C. 1334(b) (emphasis added). Thus we can rephrase the first question presented in this appeal as follows: whether the district court's order implicates property of the estate and therefore falls under the exclusive jurisdiction of the bankruptcy court or instead is considered a [sic] merely a related matter over which the district court could properly exercise jurisdiction.

This court has previously held that district courts have jurisdiction to determine whether a bankruptcy court stay applies to proceedings before it. In *Hunt v. Bankers Trust Co.*, this court ruled that the issue of whether "the stay applies to litigation otherwise within

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[4] The bankruptcy courts sit under the auspices of the district court in the jurisdiction for which they operate. 28 U.S.C. § 157(a).

the jurisdiction of a district court or court of appeals is an issue of law within the competence of both the court within which the litigation is pending . . . and the bankruptcy court." 799 F.2d 1060, 1069 (5th Cir.1986) (citing *In re Baldwin – United Corp. Litigation*, 765 F.2d 343, 347 (2d Cir.1985)); *see also, Picco v. global Marine Drilling Co.*, 900 F.2d 846, 850 (5th Cir.1990) (district courts retain jurisdiction to determine applicability of stay of litigation pending before them). The district court had jurisdiction to evaluate whether the motion to execute the supersedeas bond would fall under the exclusive jurisdiction of the bankruptcy court.

III. Automatic Stay

We now turn to whether the automatic stay, 11 U.S.C. 362(a), prevents the district court from proceeding with the execution of the supersedeas bond. The automatic stay provisions of the Bankruptcy Code enable bankruptcy courts to take control of all of the assets of the debtor giving the court opportunity to survey the landscape of debtor's financial condition before reorganizing the estate. *Hunt v. Bankers Trust Co.*, 799 F.2d at 1069.

A victorious plaintiff who obtains a bare judgment against a defendant becomes an unsecured judgment creditor of that defendant. The judgment is payable immediately, but a defendant may obtain stay of execution on the judgment by posting a supersedeas bond. *See* Fed.R.Civ.P. 62(d). A defendant who posts a supersedeas bond retains a reversionary interest in the bond subject to divestment.

In many cases, the supersedeas bond will be posted by a third party. *See e.g. Southmark Corp. v. Riddle (In re Southmark Corp.)* 138 B.R. 820, 824-25 (Bankr.N.D.Tex. 1992). In exchange for agreeing to post the supersedeas bond, the third party normally takes some sort of security from the judgment debtor. *Id.* In this case, Northbrook acted as surety on the bond securing its interest with insurance proceeds from Celotex' policy with Northbrook. *See In re Celotex Corp.*, 128 B.R. at 480.

Celotex argues that as the judgment debtor, it has an identity of interest with Northbrook as the surety of the supersedeas bond. Therefore, they reason that the bankruptcy court was justified in applying section 362 to stay any proceeding against Northbrook. Celotex cites the Fourth Circuit decision in *A.H. Robbins Co. v. Piccinin (In re A.H. Robbins)* in which the court held that " 'there are cases [under 362(a)(1)] where a bankruptcy court may properly stay the proceedings against non-bankrupt co-defendants'. . . . [This occurs] when there is such identity between the debtor and the third-party defendant that the debtor may be said to be the real party defendant and that a judgment against the third-party defendant will in effect be a judgment or finding against the debtor." 788 F.2d 994, 999 (4th Cir.1986) *cert. denied* 479 U.S. 876, 107 S.Ct. 251, 93 L.Ed.2d 177 (1986) (citing *Johns-Manville Sales Corp.*, 26 B.R. 405, 410 (Bankr. S.D.N.Y.1983)).

Celotex argues that because Northbrook received a security interest in the insurance proceeds, releasing the bond to the plaintiffs will allow Northbrook to automatically recover its rights to those proceeds. This result would diminish the total amount available to be paid out to the remaining claimants. Therefore, appellants ask us

to allow the bankruptcy court to stay execution on the supersedeas bonds in order to preserve as much of the debtor's estate as possible.

The wording of section 362(a) belies Celotex' argument. The statue states that the automatic stay is applicable to "(1) the commencment or continuation, including the issuance or employment of process, of a judicial, administrative or other action or proceeding against the debtor . . . (3) any act to obtain possession of property of the estate." Thus the statute limits the bankruptcy court to stays in only those proceedings in which the debtor or his or her property is in controversy. Because this is suit against Northbrook, not the bankrupt, the only way the automatic stay could apply is if the court finds that the bond is property of the debtor's estate.

We recognize that the Bankruptcy Code defines property of the estate quite broadly to include "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. 541(a)(1). *See U.S. v. Whiting Pools, Inc.*, 462 U.S. 198, 204, 103 S.Ct. 2309, 2313, 76 L.Ed.2d 515 (1983) (holding that the definition of property of the estate includes property in which debtor no longer has a possessory interest). Nevertheless, we do not believe that this definition is so broad as to include the kind of interest under consideration in the present case.

In considering the same issue in a case involving another asbestos claimant to the Celotex estate, the court in *Willis v. Celotex Corp.* rejected Celotex' reasoning, stating that the guarantor has a duty "separate form and independent of Celotex' duty to pay the judgments." 978

F.2d 146, 148 (4th Cir.1992) *cert. denied* ___ U.S. ___, 113 S.Ct. 1846, 123 L.Ed.2d 470 (1993). Because there was no identity of interest between Celotex and its guarantor, the proceedings against the guarantor of the supersedeas bond were not stayed under § 362(a)(1). *Id.* at 149. The obligations of a surety are sufficiently independent to provide the basis of an action by the judgment creditor to collect on the bond unfettered by the automatic stay provisions of the Bankruptcy Code.

In an analogous case this court decided that any payments made under a secured letter of credit do not constitute property of the debtor. *Kellogg v. Blue Quail Energy Inc. (In re Compton Corp.)* 831 F.2d 586, 589 (5th Cir.1987), *modified on other grounds*, 835 F.2d 584 (1988) ("When the issuer honors a proper draft under a letter of credit, it does so from its own assets and not from the assets of [the debtor] who caused the letter of credit to be issued"). Because the letter of credit is not part of the Debtor's estate, we ruled that the bankruptcy court could not enjoin a payment of funds from the letter of credit to the beneficiary. *Id.* This court reasoned that central to the letter of credit is the independence principle in which the "issuers obligation to the letter of credit beneficiary is independent from any obligation between the beneficiary and the issuer's customer." *Id.* at 590.

The concerns which the court considered relevant to the letter of credit are similarly relevant to the surety-debtor relation at issue here. *In re Southmark*, 138 B.R. at 828 ("the supersedeas bond or undertaking on appeal resembles the secured letter of credit"). The promise of the bank to pay on a letter of credit is indistinguishable

from Northbrook's promise to act as surety on the supersedeas bond. In both cases the promise is to perform an obligation of the debtor when and if the debtor becomes unable to do so itself. The surety's obligation on a supersedeas bond once the appeal has been completed is as separate and independent from the principal's obligation, as is the bank's obligation on a letter of credit. Thus the automatic stay provisions of § 362(a) do not apply to the guarantor of a supersedeas bond because the bond is not property of the bankrupt's estate once the bond has matured and become enforceable. It was therefore proper for the district court to allow the judgment plaintiffs to execute the supersedeas bond against the surety as a separate and independent obligor on the debt.

The bankruptcy court holding jurisdiction over Celotex' bankruptcy itself admitted that "[w]here a debtor, upon the filing of the bankruptcy petition, is an unsuccessful appellant in the total appellate process, or during the bankruptcy case is unsuccessful in its appeal, its property interest in the bond can be divested and any efforts by the debtor to prevent the judgment creditor from proceeding against the supersedeas bond must be sought under Section 105 of the Bankruptcy code." *In re Celotex Corp.*, 128 B.R. at 482. In this case, because the appeal has been completed and mandate issued, the claim Celotex may have once had on the supersedeas bond has thereby terminated.

This opinion should not be read to infer that the bankruptcy court lacked authority to issue a stay order over supersedeas bonds generally. Our decision today is limited to the holding that the bankruptcy court lacked authority over this particular supersedeas bond. Because

the appellate process had been completed and Celotex no longer had an interest, reversionary or otherwise, in this particular supersedeas bond, the automatic stay provisions will not prevent Northbrook from fulfilling its obligation.

While we need not state the precise reach of § 362(a) to third parties, we hold that the automatic stay cannot be invoked to paralyze judgment creditors from pursuing the surety of a supersedeas bond once the debtor has lost the appeal for which the bond was posted.

IV. Section 105 Stay

Turning now to the more difficult issue raised by this appeal, we confront the question of whether the equitable powers granted bankruptcy courts apply to the type of non-debtor third parties present here.

Celotex argues that section 105 of the Bankruptcy Code gives bankruptcy courts virtually limitless ability to bring parties to heel to its authority. Section 105(a) states, in part, that the bankruptcy "court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." In *In re S.I. Acquisition, Inc.* this court recognized that a bankruptcy court has broad discretionary power under section 105 to affirmatively stay proceedings in other courts. 817 F.2d 1142, 1146 n. 3 (5th Cir.1987); *Wedgeworth v. Fibreboard Corp.* 706 F.2d 541, 545 (5th Cir.1983).

The jurisdiction of bankruptcy courts has been extended to include stays on proceedings involving third parties under the auspices of 28 U.S.C. § 1334(b) which

provides for jurisdiction of the bankruptcy court for matters "related to a case under title 11."[5] Appellant argues that under this jurisdictional grant, the equitable powers of the bankruptcy court are sufficient to stay a proceeding to release the supersedeas bond.

The Fourth Circuit in *Willis*, examining the very same section 105(a) order at issue in this case, decided that the bankruptcy court's power was sufficient to stay proceedings against third parties on supersedeas bonds. The court based its reasoning upon the "magnitude of the task [the bankruptcy court] faced in attempting to oversee the bankruptcy proceedings, resulting from the sheer number of pending personal injury cases in which supersedeas bonds had been posted." 978 F.2d at 149. The number of cases against Celotex is, in fact, quite staggering. Over 141,000 asbestos related bodily injury claims were pending against the debtor Celotex at the time it filed for bankruptcy. *In re Celotex Corp.*, 128 B.R. at 480. Of those, over 100 cases had appeals pending, in support of which Celotex claims to have posted over $70 million in supersedeas bonds. *Id.* In light of the "extraordinary facts presented by the Celotex bankruptcy" 978 F.2d at 147, the *Willis* court concluded that a stay of proceedings to prevent enforcement of supersedeas bonds was a proper exercise of the bankruptcy court's authority under section 105(a).

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[5] In considering the question of whether co-defendants are included within a § 105 stay, this court held that § 105 "does empower the bankruptcy court to stay proceedings against non-bankrupt entities." *In re S.I. Acquisition*, 817 F.2d at 1146 n. 3. *See also MacArthur Co. v. Johns-Manville Corp.*, 837 F.2d 89, 93 (2nd Cir. 1988) (section 105 allows stays against third party insurers).

It is important to remember that the section 105 stay issued by the bankruptcy court does not, on its face, reach to third parties. Thus, taking the bankruptcy court at its word, we are unable to see how the section 105 order could reasonably be applied to the present proceedings which involve a separate and independent third party obligation. The bankruptcy court stay was written to apply only to the debtor and its property. As we have shown in the preceding section, the property of the debtor cannot be extended to include the separate obligations of a nonbankrupt surety. Our decision in *Blue Quail* is particularly relevant as to the separateness of guaranty obligations from the property of a debtor's estate.

However, this court has at times found it appropriate to broadly construe bankruptcy court stays to apply beyond the property of the debtor. *In re Davis*, 730 F.2d 176, 183 (5th Cir.1984) (exercising the bankruptcy court's stay powers against non-debtor third parties when the proceedings in question "pose a significant threat to the estate.") Indeed, the bankruptcy court in this case has ruled that the stay, in its present state, would apply to enjoin the Edward's proceedings against Northbrook to execute the supersedeas bond. *In re Celotex Corp.*, 128 B.R. at 484. The bankruptcy court has decided that even when, "the judgment creditor has been successful throughout the appellate process, the judgment creditor is not able to proceed against the supersedeas bond without seeking to vacate the section 105 stay in this Court." *Id.*

Therefore, we cannot simply assume that because Northbrook does not appear to be included on the face of the stay, the bankruptcy court will exempt it from the reach of the stay. The issue presented in this appeal must

then be sharpened to the question of whether prudential (or other) considerations justify extending the bankruptcy court's jurisdiction to the point where it includes the power to stay the proceedings in question here.

The Supreme Court has made clear the importance of placing definite limits on the equity powers of bankruptcy courts. *See Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 80-81, 102 S.Ct. 2858, 2876, 73 L.Ed.2d 598 (1982) (plurality opinion) (holding that because bankruptcy courts are non-Article III courts they must be limit in function and authority). This court has itself previously limited the powers of bankruptcy courts in *Wedgeworth v. Fibreboard Corp.* where we held that, "[a]lthough we recognize the court's broad discretion in this area, such control is not unbounded. Proper use of this authority calls for the exercise of judgment, which must weigh competing interests and maintain an even balance.[ ]" 706 F.2d at 545 (citing *Landis v. North American Co.*, 299 U.S. 248, 254-55, 57 S.Ct. 163, 165-6, 81 L.Ed. 153 (1936)).

While we recognize the burdens which have been placed upon the bankruptcy court by the immensity of litigation pending in this case, we disagree with the Fourth Circuit's proposed solution in *Willis*. We believe that we cannot afford to shut down the dispensation of justice simply because there is a bankruptcy.[6] Although the idea of using the bankruptcy court as a clearing house

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[6] The court in *Willis* expressed the hope that the bankruptcy court will quickly rule on the motion for relief from the stay. 978 F.2d at 149 n. 5. At this point, aspirations for an expeditious resolution appear quixotic at best.

for all of these cases may seem desirable as a policy matter, section 105(a) simply does not give bankruptcy courts authority over assets that are not property of the debtor's estate and in which the debtor has no interest. We cannot globalize the bankruptcy court's authority in this manner.

Celotex made a promise to the prevailing plaintiffs (and the court) by posting the supersedeas bond that the bond would "secure[ ] the prevailing party against any loss sustained as a result of being forced to forgo execution on a judgment during the course of an ineffectual appeal" *Poplar Grove Planting and Refining Co., v. Bache Halsey Stuart, Inc.*, 600 F.2d 1189, 1191 (5th Cir.1979); *Federal Prescription Service, Inc. v. American Pharmaceutical Association* 636 F.2d 755 (D.C.Cir.1980) (describing the purpose of supersedeas bond to secure appellee in cases where there is some chance of the judgment debtor being unable or unwilling to satisfy the judgment). Supersedeas bonds serve as an obligation on an appellant to insure that an appellee who is deprived of the immediate opportunity to collect his or her judgment will not be prejudiced by the delay.

Allowing appellant to file for bankruptcy and thereby stay execution on the supersedeas bond would eviscerate the very purpose of these bonds. Once the appeal is decided and mandate has issued, the judgment creditor has an enforceable right to collect that which the trial court has previously determined is rightfully his or her own. The supersedeas bond was posted to cover precisely the type of eventuality which occurred in this case, insolvency of the judgment debtor. It is manifestly unfair to force the judgment creditor to delay the right to

collect with a promise to protect the judgment only to later refuse to allow that successful plaintiff to execute the bond because the debtor has sought protection under the laws of bankruptcy.

Furthermore, this argument is buttressed by the fact that it is the purpose of the surety relation to provide creditors with another avenue to pursue the debt. Becoming the surety on the supersedeas bond, Northbrook took the place of the judgment creditor in bearing the risk that Celotex would be unable to pay the debt. *See Blue Quail,* 831 F.2d at 589-90. (holding that for letters of credit, "the shifting of liability to the bank rather than to the [creditor] is the main purpose of the letter of credit. After all, the bank is in a much better position to assess the risk of its customer's insolvency."). If we permit Northbrook to escape its liability by taking refuge under the protective umbrella of Celotex' Title 11 bankruptcy proceedings, we would thereby doubly disappoint the Edwards plaintiffs by first delaying their judgment under a supersedeas bond which they can no longer execute *and* then, second, failing to enforce the promise made by Northbrook to guarantee that bond. We should not, unless absolutely compelled, let such an unjust result stand. There are no such compulsions here.

Section 105 authorizes a bankruptcy court to enjoin litigants from pursuing actions pending in other courts that threaten the integrity of a bankrupt's estate. *In re Davis,* 730 F.2d at 184. However, the integrity of the estate is not implicated in the present case because the debtor has no present or future interest in this supersedeas

bond.[7] Whatever the ultimate scope of section 105, it does not extend so far as to give the bankruptcy court authority over a supersedeas bond in which the debtor has no interest. Because the appeal has terminated and mandate issued, the surety's liability on the bond matured and the judgment creditors should be allowed to collect.

In coming to the opposite conclusion from the decision we reach today, the *Willis* court held that the "hiatus from execution on the bonds was necessary to permit the bankruptcy court to take control of the immense litigation." 978 F.2d at 150. The idea of hiatus employed by the Fourth Circuit parallels the intent Congress manifested in providing equitable powers to the bankruptcy court in the first place. The power to stay proceedings in other courts was intended as a provisional measure to afford "the debtor a breathing spell from his creditors. It stops all collection efforts, all harassment, and all foreclosure actions." 1978 U.S.C.C.A.N. at 6296-97. In order that this

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[7] The status of the surety agreement which allegedly gives Northbrook a collateralized interest in insurance proceeds owed to the debtor Celotex is not sufficiently demonstrated to suggest that Northbrook and Celotex indeed have an identity of interest such that executing against Northbrook would be the same as proceeding against the property of the debtor. In this respect, the bankruptcy court was correct when it held that "whether a debtor can reject or assume the surety agreement or avoid it and thus seek return of the collateral may be an issue solely between the debtor and its surety. *In re Celotex,* 128 B.R. at 481.

In addition, we lack evidence of the effect of the agreement between Celotex and Northbrook other than generalized statements by Celotex unrelated to the situation of these plaintiffs. We cannot base a decision on a document that was not presented to the court.

breathing spell not suffocate the creditor's claims, we must take care to insure that the hiatus not extend to the point where it becomes a permanent vacation.

In this case, the judge granted the original stay almost three years ago. The complexities of this litigation make it likely that a satisfactory and fair dispensation of Celotex' assets will be a long time coming. We cannot allow the concern for resolving the monstrous tangle of conflict and contradiction to overwhelm our duty to do justice to these plaintiffs. Due to the likelihood of any stay becoming a perpetual prohibition on plaintiffs collecting their judgment, we hold that the stay is not within the equitable powers of the bankruptcy court for the situation at bar.

These plaintiffs have survived many long years fighting through the system. On October 12, 1990, they emerged with what appeared to be a final victory in this protracted litigation. Greeting them was Celotex, postponing the plaintiff's relief with the claim that because there are so many other victims of this terrible poison, the Edwards will have to postpone yet again the day in which they receive what is their due. It is our job to see that they wait no longer. The Edwards were specifically promised by the court and by Celotex that they could look to the supersedeas bonds if they won on appeal and we should be careful to see that their expectations are not nullified because of a generalized and theoretical concern for the bankrupt's estate.

We conclude by calling attention one last time to the fact that this circuit in *Blue Quail* did not bow in complete obeisance to a bankruptcy court stay. Fairness and equity

require that we also not bow in this case where the Edwards' claim is all the more compelling. Having completed the appellate process before the debtor went into bankruptcy, the supersedeas bond matured, and the district court acted properly in executing the bond against Northbrook.

V.

For the reasons stated above, we AFFIRM.

EDITH H. JONES, Circuit Judge, specially concurring:

I agree wholeheartedly with Judge Goldberg's analysis showing the inapplicability of the § 362 stay to this case and with his interpretation of the plain meaning of the Celotex bankruptcy court's § 105 stay order. Because the § 105 stay order did not purport to reach the district court's order against Northbrook in this case, however, I would not reach the question of the bankruptcy court's power to issue such an order.

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING
EN BANC

Dec. 22, 1993.

Before: POLITZ, Chief Judge, GOLDBERG and EDITH H. JONES, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on

rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

A few explanatory words are offered. Appellants contend that we should not collaterally attack an order of a bankruptcy court sitting under the jurisdiction of the Eleventh Circuit. This contention fails for two reasons. Primarily, the bankruptcy court's order does not purport to reach the proceedings in this case and therefore executing the supersedeas bond does not infringe on the Eleventh Circuit's proper jurisdiction. Secondarily, our opinion merely declares this court's power to protect and preserve supersedeas bonds posted in our district courts. Thus, we have not held that the bankruptcy court in Florida was necessarily wrong; we have only concluded that the district court, over which we do not have appellate jurisdiction, was right.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
TEXAS WICHITA FALLS DIVISION

BENNIE EDWARDS and JOANN EDWARDS	§	
VS.	§	CIVIL ACTION NO. 7-87-0050
THE CELOTEX CORPORATION, ET AL.	§	

ORDER

(Filed May 27, 1992)

CAME ON TO BE HEARD plaintiffs' Motion for Release of Supersedeas Bond, and the court, being advised of the premises, is of the opinion that said motion has merit and should be granted. It is therefore

ORDERED that plaintiffs may execute on the supersedeas bond executed by Northbrook Property and Casualty Insurance Company on May 17, 1989 to secure the judgment entered in plaintiffs' favor against the Celotex Corporation in the above styled and numbered cause.

Signed this 27th day of May, 1992.

/s/ David O. Belew, Jr.
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
TEXAS WICHITA FALLS DIVISION

BENNIE EDWARDS, et al.,	*	
	*	
Plaintiffs,	*	CIVIL ACTION
VS.	*	NO. CA 7-87-50
	*	
CELOTEX CORPORATION, et al.,	*	
	*	
Defendants.	*	

JUDGMENT

(Filed April 17, 1989)

This action came on for trial before the Court and a jury, and issues having been duly tried and the jury having duly rendered its verdict,

It is ORDERED, ADJUDGED and DECREED that the Plaintiffs recover from defendant, the Celotex Corporation, the following sums:

1. Bennie Edwards shall recover past damages in the sum of Ten Thousand, One Hundred Ninety-Five Dollars and Sixty Cents ($10,195.60), with prejudgment interest at the rate of 10% per annum to accrue from September 21, 1986 until the date of this judgment, and future damages in the sum of Fourteen Thousand, Two Hundred Eighty-Eight Dollars and Twenty Cents ($14,288.20).

2. Joann Edwards shall recover past damages in the sum of Three Thousand, Five Hundred Ninety Dollars and No Cents ($3,590.00), with prejudgment interest at the rate of 10% per annum to accrue from September 21,

1986 until the date of this judgment, and future damages in the sum of Seven Thousand, One Hundred Eighty Dollars and No Cents ($7,180.00).

It is further ORDERED, ADJUDGED and DECREED that Plaintiffs, Bennie Edwards and Joann Edwards, recover from Defendant, Celotex Corporation, punitive damages in the sum of Two Hundred Forty-Five Thousand, Five Hundred Dollars and No Cents ($245,500.00).

It is further ORDERED, ADJUDGED and DECREED that Plaintiffs, Bennie Edwards and Joann Edwards, shall recover from Defendant, Celotex Corporation, their costs of this action, and interest on the judgment at the rate of 9.51% per annum as provided by law from the date of this judgment.

ENTERED this 17th day of April, 1989.

/s/ Mary Lou Robinson
MARY LOU ROBINSON
UNITED STATES DISTRICT
JUDGE

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

IN RE:	Chapter 11
THE CELOTEX CORPORATION, et al.,	Consolidated Case Nos.: 90-10016-8B1 and 90-10017-8B1
Debtors. /	

ORDER GRANTING EMERGENCY MOTION FOR DETERMINATION OF APPLICABILITY OF §362 STAY OF PENDING MATTERS OR, IN THE ALTERNATIVE, FOR EXTENSION OF §362 STAY TO PENDING MATTERS

THIS CAUSE came before the Court upon the Debtors' Motion for Determination of Applicability of §362 Stay to Pending Matters or, in the Alternative, for Extension of §362 Stay to Pending Matters (the "Motion"). There being no objection hereto by the United States Trustee, and the Court having considered the Motion, the arguments of counsel regarding the merits of the Motion, the record in the case and being otherwise duly advised in the premises, finds that this Court pursuant to 28 USC §1471(e), has exclusive jurisdiction of all of the property of The Celotex Corporation and Carey Canada Inc., wherever located, and that this Court, pursuant to §§105 and 362 of the Bankruptcy Code, may issue any order, process or judgment as may be necessary or appropriate to carry out the provisions of the Bankruptcy Code and sufficient cause appearing therefore, it is hereby

ORDERED, ADJUDGED AND DECREED that:

1. Debtors' Motion be, and the same is, hereby granted.

2. All persons (including individuals, partnerships and corporations, and all those acting for or on their behalf), and all governmental units (including the United States of America and any State, Commonwealth, District, Territory, municipality, department, agency or instrumentality of the United States, a State, a Commonwealth, a District, a Territory, a municipality, a foreign state, or other foreign or domestic governments, and all those acting for or on their behalf and all other entities (collectively, "Entities") be and each of them are hereby stayed, restrained and enjoined from:

a. Commencing or continuing, including issuing or employing process, any judicial, administrative or other proceeding against any of the Debtors that was or could have been commenced before the commencement of the Debtors' Chapter 11 cases, or recovering a claim against any of the Debtors that arose before the commencement of the Debtors' Chapter 11 cases;

b. Enforcing, against any of the Debtors or against property of any of the Debtors, a judgment obtained before the commencement of the Chapter 11 cases;

c. Taking any act to obtain possession of property of any of the Debtors or of property from any of the Debtors;

d. Taking any act to create, perfect or enforce any lien against property of any of the Debtors;

e. Taking any act to create, perfect or enforce against property of any of the Debtors, any lien to the extent that such lien secures a claim that arose before the commencement of the Chapter 11 cases;

f. Taking any act to collect, assess, or recover a claim against any of the Debtors that arose before the commencement of the Chapter 11 cases; and

g. Offsetting any debt owing to any of the Debtors which arose before the commencement of the Chapter 11 cases against any claim against any of the Debtors.

3. Notwithstanding any exceptions or limitations to the automatic stay contained in §362(b) of the Code, all Entities are hereby jointly and severally stayed, restrained and enjoined from commencing or continuing any judicial, administrative or other proceeding involving any of the Debtors regardless of (a) who initiated the proceeding, (b) whether the matter is on appeal and a supersedeas bond has been posted by the Debtors or (c) the appellant in an appeal is one of the Debtors.

4. On request of a party in interest, and after not less than thirty (30) days' written notice to the attorneys for the Debtors, and after a hearing, this Court may consider granting relief from the restraints imposed herein in the event that it be deemed necessary, appropriate and warranted to so terminate, annul, modify or condition the injunctive relief granted herein.

5. The automatic stay under §362 of the Bankruptcy Code and as extended by this Order operates to stay the

continuation of pending matters only as against The Celotex Corporation and Carey Canada Inc. and does not operate to stay the continuation of such matters as against any other named defendant therein unless proceedings under the Bankruptcy Code have been commenced by or against such other named defendant.

DONE AND ORDERED at Tampa, Florida, on October 17, 1990.

/s/ Thomas E. Baynes, Jr.
Thomas E. Baynes, Jr.
United States
Bankruptcy Judge

cc: Jeffrey W. Warren, Esq.
Lynne L. England, Esq.
Debtors

19g/plr/p-6

In the Matter of the CELOTEX CORPORATION, et al.,

Debtors.

Bankruptcy Nos. 90-10016-8B1, 90-10017-8B1.

United States Bankruptcy Court,
M.D. Florida,
Tampa Division.

June 13, 1991.

Personal injury plaintiffs in asbestos litigation against Chapter 11 debtor moved to release supersedeas bonds. The Bankruptcy Court, Thomas E. Baynes, Jr., J., held that bonds were property of defendant's bankruptcy estate subject to automatic stay, and only available to personal injury plaintiffs, should their cases ultimately be affirmed on appeal, upon application to Bankruptcy Court.

Motion denied.

Jeffrey W. Warren, for debtor.

Ketchey, Horan, Hearn & Neukamm, for Asbestos plaintiffs.

Charles M. Tatelbaum, Johnson, Blakely, Pope, Bokor, Ruppel & Burns, for the Unsecured Trade Creditors Committee.

Lipsitz, Green, Fahringer, Roll, Salisbury & Cambria, for claimant Marion George and Others.

Baron & Budd, P.C., Gillenwater, Nichol & Ames, Kazan, McLain, Edises & Simon, Ness, Motley, Lodeholt, Richardson & Poole, Jaques Admirality Law Firm,

Greitzer & Locks, for Asbestos-Related Personal Injury Creditors.

William Knight Zewadski, Trenam, Simmons, Kemker, Scharf, Barkin, Frye & O'Neill, for Unofficial Asbestos Health Claim Co-Defendants' Committee.

Kozyak, Tropin, Throckmorton & Humphreys, P.A., for the Asbestos Property Damage Claimants Committee.

Gillenwater, Nichol & Ames for Danny W. Berlin.

Verrill & Dana, Portland, Me., for The American Hospital Ass'n.

B. Mills Latham, for appellees.

OMNIBUS ORDER ON MOTION TO LIFT STAY WITH REGARD TO CELOTEX APPEALS AND TO RELEASE SUPERSEDEAS BONDS THEREON

THOMAS E. BAYNES, Jr., Bankruptcy Judge.

THIS CAUSE came on for consideration upon the (1) Motion Challenging Jurisdiction of Court over Property of Non-Debtors, (2) Motion to Lift Stay with Regard to Celotex Appeals and to Release Supersedeas Bonds Thereon, and (3) related issues raised by the enormous litigation in this case. By Order entered January 10, 1991, the Court denied the Motion Challenging Jurisdiction of Court over Property of Non-Debtors and granted, in part, the Motion to Lift Stay with Regard to Celotex Appeals and to Release Supersedeas Bonds Thereon. Specifically, the Court lifted the stay to enable the pending appellate actions to proceed but did not lift the stay with respect to the supersedeas bonds which Debtor posted in order to

obtain stays pending appeals of the underlying litigations. One of the remaining issues is whether the supersedeas bonds posted by Debtor are property of the bankruptcy estate subject to the automatic stay and thus not available for payment to the asbestos-related bodily injury plaintiffs should their cases ultimately be affirmed on appeal. The Court finds such a determination to be a core proceeding. 28 U.S.C. § 157(b)(2)(A), (G), (O). *See also LTV Corp. v. Aetna Casualty and Surety Co. (In re Chateaugay Corp.)*, 116 B.R. 887 (Bankr.S.D.N.Y.1990); *Garrity v. Leffler (In re Neuman)*, 71 B.R. 567 (S.D.N.Y.1987).

The Court, having considered the Motions, the record, and the memoranda of law submitted by the interested parties,[1] finds:

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[1] In the Order entered January 10, 1991, the Court directed Debtor and Movants (asbestos Plaintiffs represented by the law firm of Wellborn, Houston, Adkinson, Mann & Sadler) to file legal memoranda addressing the issue of whether the supersedeas bonds are property of the estate. In addition, the Unsecured Trade Creditors Committee and B. Mills Latham submitted legal memoranda on the status of the supersedeas bonds. The Unsecured Trade Creditors Committee felt compelled to set forth its views on the supersedeas bond issue since resolution of that issue will have a direct and material effect upon all creditors of the estate. Latham, on November 28, 1990, was ordered to show cause why he should not be held in contempt for seeking release of a supersedeas bond posted by Debtor to obtain a stay pending appeal in *Celotex Corp. v. Tate*, 797 S.W.2d 197 (Tex.App. – Corpus Christi 1990). At the hearing held December 11, 1990, on the order to show cause, the Court directed Latham to file a memorandum on the supersedeas bond issue.

In addition to the memoranda filed by Movants, Debtor, the Unsecured Trade Creditors Committee, and Latham, memoranda on the supersedeas bond issue were filed by Marion

The Celotex Corporation and Carey Canada Inc. (collectively referred to as "Debtor") filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code (11 U.S.C.) on October 12, 1990. At the time the petition was filed, over 141,000 asbestos-related bodily injury lawsuits were pending against Debtor.[2] On that date over 100 appeals were pending in asbestos-related bodily injury cases in which Debtor and others were appealing adverse judgments. Three of those pending appeals are of particular interest to this case.

On April 3, 1989, the United States District Court for the Eastern District of Texas entered a judgment against Debtor in the total amount of $2,593,625. *King v. Armstrong World Indus.*, No. M-85-44-CA. Debtor appealed this adverse judgment to the United States Court of Appeals for the Fifth Circuit.[3] In order to stay execution of the judgment pending appeal, Debtor posted a supersedeas bond issue by Northbrook Property and Casualty

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George, the Asbestos-Related Personal Injury Creditors, hospital members of the American Hospital Association, the Unofficial Asbestos Health Claim Co-Defendants Committee, the Asbestos Property Damage Claimants, Greitzer and Locks, and Danny W. Berlin.

[2] The Celotex Corporation is a major manufacturer of building and roofing products for residential and commercial use. Carey Canada Inc. had been a miner of raw chrysotile asbestos fibers. In addition to the pending asbestos-related bodily injury lawsuits, Debtor also has been a defendant in 310 asbestos-related property damage lawsuits.

[3] The Court of Appeals has affirmed the judgment of the District Court. *King v. Armstrong World Indus.*, 906 F.2d 1022, reh'g denied, 914 F.2d 251 (5th Cir.1990), *cert. denied*, ___ U.S. ___, 111 S.Ct. 2236, 114 L.Ed.2d 478 (1991).

Insurance Company. The bond was executed on May 17, 1989, and approved by the District Court on May 26, 1989. Insurance procedures were used as collateral to secure the bond issued by Northbrook.

On November 1, 1989, the District Court for the Fourth Judicial District, Rusk County, Texas, entered a judgment against Debtor in the total amount of $5,379,299.50. *Pool v. Fibreboard Corp.*, No. 86-363, and *Williams v. Fibreboard Corp.*, No. 88-08-293. The damage award was comprised of $4,179,299.50 in compensatory damages[4] and $1,200,000 in punitive damages. Debtor appealed this adverse judgment to the Court of Appeals of Texas, Sixth Judicial District, Texarkana. In order to stay execution of the judgment pending appeal, Debtor posted two supersedeas bonds issued by National Union Fire Insurance Company of Pittsburgh, Pa. Each bond was executed on February 1, 1990. A combination of cash and insurance was used as collateral to secure each bond issued by National Union.

On January 22, 1990, the United States District Court for the Eastern District of Texas entered a judgment against Debtor in the total amount of $6,417,625. *Glasscock v. Armstrong Cork Co.*, No. M-85-158-CA. Debtor appealed this adverse judgment to the United States Court of

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[4] Debtor's liability for compensatory damages was joint and several with four or five co-defendants. The jury determined Debtor's portion of the liability was either 15% or 25% depending upon the particular asbestos plaintiff. The trial court determined that each defendant have contribution and indemnity against each other defendant in accordance with the percentage findings of the jury.

Appeals for the Fifth Circuit. In order to stay execution of the judgment pending appeal, Debtor posted a supersedeas bond issued by National Union Fire Insurance Company of Pittsburgh, Pa. The bond was executed on February 5, 1990, and approved by the District Court on February 7, 1990. A combination of cash and insurance was used as collateral to secure the bond issued by National Union.

I.

The genesis of any review of whether a supersedeas bond is property of the estate is the pre-Code decision of the Court of Appeals for the Third Circuit in *Mid-Jersey National Bank v. Fidelity-Mortgage Investors*, 518 F.2d 640 (3d Cir.1975). From that opinion black letter law has been ascribed by some: as supersedeas bond is not property of the estate, thus the automatic stay pursuant to Section 362 of the Bankruptcy Code does not preclude the judgment creditor from going against the surety bond. *See W.W. Gay Mechanical Contractor v. Wharfside Two*, 545 So.2d 1348 (Fla.1989); *J.M. Beeson Co. v. Sartori*, 553 So.2d 180 (Fla. 4th DCA 1989).

From *Mid-Jersey* we learn a deposit of funds by the debtor with the Clerk of the Court in lieu of a supersedeas bond is *in custodia legis*. The Third Circuit in *Mid-Jersey* determined the debtor had a "contingent reversionary interest as a potential beneficiary of the trust" in that supersedeas bond. *See also Vescovo v. First State Bank (In re Vescovo)*, 125 B.R. 468, 471 (Bankr.W.D.Tex.1990). Such a characterization has interesting connotations as well as incongruities. First, basic property law would suggest a

reversionary interest is never contingent but is vested subject to divestment. Second, since the debtor, as appellant, may be successful on appeal, the debtor must be deemed under the *Mid-Jersey* theorem to be a potential beneficiary under the trust.[5] In such light, an argument can be made that the debtor has a property interest in a supersedeas bond. Section 541(a)(1) of the Bankruptcy Code states "all legal or equitable interests of the debtor in property as of the commencement of the case" is property of the estate "wherever located and by whomever held." Third, if the debtor holds a future interest or an equitable interest as a beneficiary of a trust under *Mid-Jersey*, that interest must be property of the estate even if that interest is subject to divestment.[6]

Parenthetically, one must remember the dichotomy between the supersedeas bond and the surety agreement and collateral securing the bond when making this analysis. The latter two are property of the estate. Whether a debtor can reject or assume the surety agreement or avoid it and thus seek return of the collateral may be an issue solely between the debtor and its surety.[7] The status of

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[5] Such a deposit is likened to a trust where the court is the trustee with the duty to determine the beneficiaries at the end of the appellate process. *See Gnidovec v. Alwan (In re Alwan Bros.)*,105 B.R. 886 (Bankr.C.D.Ill.1989).

[6] If some trust theory is to be used, this Court would suggest utilizing a resulting trust theory rather than making the debtor a beneficiary of some hypothetical trust.

[7] While these matters may not add any greater status to the bond as property of the estate, they have been of concern to the reorganizational process. *See Kellogg v. Blue Quail Energy, Inc. (In re Compton Corp.)*, 831 F.2d 586 (5th Cir. 1987); *In re Chateaugay Corp.*, 116 B.R. at 896-899.

the supersedeas bond is a distinct, but interconnected, issue.

This Court has reviewed *Mid-Jersey* and its progeny. The *Mid-Jersey* court, considering pre-Code law, did not have before it the expansive views established by Congress in Section 541 and Section 362 of the Bankruptcy Code. The other courts which have reviewed the issue of supersedeas bonds as property of the estate appear to have adopted the *Mid-Jersey* rubric without an analysis of the appellate process vis-a-vis the Bankruptcy Code. *Moran v. Johns-Manville Sales Corp.*, 28 B.R. 376, 377-378 (N.D.Ohio 1983); *Johns-Manville Corp. v. Asbestos Litigation Group (In re Johns-Manville Corp.)*, 26 B.R. 420, 433 (Bankr.S.D.N.Y.1983); *W.W. Gay Mechanical Contractor*, 545 So.2d at 1350; *J.M. Beeson Co.*, 553 So.2d at 181.

Any inquiry into the status of the surety bond and any collateralization by the debtor may include:

1. The contract establishing the bond.
2. The characterization of the contract under bankruptcy or non-bankruptcy law.
3. The distribution of any collateral held as security for the bond.
4. The status of any security in the bankruptcy proceeding.

For the most part, these issues arise between the debtor and its surety when the bond is not court-affiliated such as a deposit with the clerk. It is this Court's opinion that whether the underlying bond is property of the estate is not predicated upon a determination that a judgment is a fraudulent transfer or the surety contract is executory.

II.

As to federal litigation, Rule 62(d) of the Federal Rules of Civil Procedure permits an appellant to stay execution of the judgment by posting a bond.[8] Thus, the judgment creditor is protected by the supersedeas bond during the pendency of the appeal. *See Prudential Ins. Co. of Am. v. Boyd*, 781 F.2d 1494, 1498, *reh'g denied*, 788 F.2d 1570 (11th Cir.1986); *see also Avirgan v. Hull*, 125 F.R.D. 185 (S.D.Fla. 1989). Only when the appellate process is concluded is the judgment creditor able to take action against the bond and the surety.

The act of filing a petition in bankruptcy during the pendency of an appellate case does not alter the operation of Rule 62 of the Federal Rules of Civil Procedure nor allow the judgment creditor or its agents to proceed upon some perfervid, yet fallacious, belief that it is now open season on the supersedeas bond.[9] By the filing of the petition, the automatic stay is activated and all proceedings against a debtor, including appellate proceedings, are stayed. 11 U.S.C. § 362(a)(1). *See O'Neill v. Continental Airlines (In re Continental Airlines)*, 928 F.2d 127 (5th

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[8] Most states provide similar protection to a judgment creditor. *See, e.g.*, Fla.R.App.P. 9.310. *See also* Fed.R.Civ.P. 65.1; Bankruptcy Rule 9025.

[9] Generally, it is in the best interest of the estate to lift the automatic stay to allow the appellate process to be completed. Once the decision of the appellate court is final, the status of the supersedeas bond as property of the estate can be ascertained. *See Atlantic Richfield Co. v. Good Hope Refineries*, 604 F.2d 865 (5th Cir. 1979). This Court has consistently granted relief from the stay to allow any pending asbestos-related bodily injury appeal to be concluded.

Cir.1991); *Balaber-Strauss v. Reichard (In re Tampa Chain Co.)*, 835 F.2d 54 (2d Cir.1987); *Cathey v. Johns-Manville Sales Corp.*, 711 F.2d 60 (6th Cir.1983), *cert. denied*, 478 U.S. 1021, 106 S.Ct. 3335, 92 L.Ed.2d 740 (1986). Moreover, any act to obtain possession of, or exercise control over, any property of the estate is stayed. 11 U.S.C. § 362(a)(3).

If at the time of filing the petition the appellate process has not been concluded, the debtor still has an interest in the supersedeas bond cognizable under Section 541 of the Bankruptcy Code subject to the interest being divested if the debtor is unsuccessful once the appellate process is completed. Fed.R.App.P. 41(a). *See Saper v. West*, 263 F.2d 422 (2d Cir.), *cert. denied*, 360 U.S. 916, 79 S.Ct. 1433, 3 L.Ed.2d 1532 (1959). This approach is correct, for otherwise all supersedeas bonds in place at the time of the filing of the petition in bankruptcy, notwithstanding the status of any appellate process, would be subject to attack by the judgment creditor as not being property of the estate. Continuing protection of the bond during the appeal is consistent with *Mid-Jersey*, 518 F.2d at 644. *See also Grubb v. Federal deposit Ins. Corp.*, 833 F.2d 222 (10th Cir.1987).

If such were not the case, the debtor, after a successful appeal, would have some new cognizable rights or property coming back from the release of the supersedeas bond now magically becoming property of the estate. If a reorganization plan had been confirmed by the time the appellate process was concluded, a debtor could claim these returning bond funds are not available to creditors. 11 U.S.C. § 1141(b). The Court of Appeals for the Seventh Circuit in *Sheldon v. Munford, Inc.*, 902 F.2d 7 (7th Cir.1990), clearly saw all these contingencies and their

attendant results when it denied a judgment creditor's attack on the debtor's supersedeas bond during the appellate process.

III.

Where a debtor, upon the filing of the bankruptcy petition, is an unsuccessful appellant in the total appellate process, or during the bankruptcy case is unsuccessful in its appeal, its property interest in the bond can be divested and any efforts by the debtor to prevent the judgment creditor from proceeding against the supersedeas bond must be sought under Section 105 of the Bankruptcy Code.

Upon Debtor's filing its bankruptcy petition, this Court entered an order pursuant to Section 105 which sought to augment the stay protection afforded by Section 362(a). Such order was upon Debtor's motion and was for the purpose of precluding, among other things, judgment creditors from proceeding in various state and federal courts against supersedeas bonds without first coming before this Court.[10]

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[10] While a few judgment creditors have proceeded against the supersedeas bonds without first coming before this Court, so far few have claimed this Court lacks authority to issue a Section 105 stay without Debtor's filing an adversary proceeding. While Bankruptcy Rule 7001 requires an adversary proceeding if a party is seeking an injunction, this Court believes the plain language of Section 105 allows this Court, *sua sponte*, to enter a stay order against any and all parties for specific or general purposes in order to ensure the integrity of the bankruptcy system and to protect the debtor in the initial stages of a reorganization proceeding. *See LTV Steel Co. v. Board of Educ. of*

The implementation of the Section 105 stay was required because of the complexity of Debtor's case. There are over 141,000 asbestos-related bodily injury cases pending against Debtor in almost every state and federal jurisdiction. There are over 100 asbestos-related bodily injury cases on appeal. Judgments totaling nearly 70 million dollars are being stayed by the supersedeas bonds posted by Debtor while the appellate processes proceed. All supersedeas bonds are secured by property of Debtor's estate.

Further, many of the pending asbestos-related bodily injury cases involve a number of co-defendants which are now in bankruptcy. Because of the automatic stay with respect to Debtor's and co-defendants' cases, various asbestos-related litigation throughout the United States has come to a halt. Similarly, the use of multi-district litigation procedures is not available. *See* Judicial Conference of the United States, Report of the Ad Hoc Committee on Asbestos Litigation (March 1991). In light of the fact 28 U.S.C. § 157 precludes this Court from liquidating the asbestos-related bodily injury cases, other than estimating claims for voting purposes, there is a potential this Court will be faced with thousands, perhaps tens of thousands, of motions to lift the stay to proceed in the various trial courts notwithstanding the fact 28 U.S.C. § 157(b)(5) does not provide an expeditious method of

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the Cleveland City School Dist. (In re Chateaugay Corp.), 93 B.R. 26, 29 (S.D.N.Y.1988); *Findley v. Blinken (In re Joint E. and S. Dists. Asbestos Litig.)*, 120 B.R. 648, 658 (E. & S.D.N.Y.1990); *In re Larmar Estates, Inc.*, 5 B.R. 328 (Bankr.E.D.N.Y.1980). *See also In re Roberts*, 68 B.R. 1004 (Bankr.E.D.Mich.1987).

dealing with these asbestos-related bodily injury cases.[11] If there is potential peripheral personal injury litigation which will circumvent the review process of either the bankruptcy court or the district court and distort the reorganization process, then Section 105 must be used. *See MacArthur Co. v. Johns-Manville Corp.*, 837 F.2d 89, 93 (2d Cir.), *cert. denied*, 488 U.S. 868, 109 S.Ct. 176, 102 L.Ed.2d 145 (1988).

At the time of filing its petition, Debtor had been engaged in continuous litigation relating to insurance coverage on asbestos-related injury claims. Debtor, asbestos litigation co-defendants and various insurance companies struck a pre-petition agreement which created a dispute resolution mechanism to facilitate claims settlements. The internal inability of this alternative dispute resolution system to proceed, coupled with other litigation over insurance coverage, has frustrated the tort litigation peripheral to this bankruptcy case. These factors complicate any procedures to deal with known asbestos claimants as well as those whose claims arose prior to the filing of the bankruptcy, but whose injuries have not yet manifested themselves. In light of the inability of the *Johns-Manville* trust to handle such potential claims, this

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[11] The nexus between Section 362(a) and 28 U.S.C. § 157 is perfectly illustrated in Debtor's case. Section 362 stays all judicial action against Debtor. If litigants/creditors wish to proceed, they must seek relief from the stay in bankruptcy court. The bankruptcy court, pursuant to 28 I.S.C. § 157(b)(2)(B), cannot deal with personal injury claims and can only provide relief by allowing the litigants to proceed to district court where it, as gatekeeper over such claims, determines where they will be liquidated. 28 U.S.C. § 157(b)(5).

Court finds it abundantly necessary to stay any and all parties from proceeding against Debtor in any forum until a determination can be made of the efficacy of any remedy, claim, or assertion of jurisdiction. Failure to bring such stability to Debtor's case in its initial stages would place this bankruptcy case on the dangerous edge of things. *Erti v. Paine Webber Jackson and Curtis, Inc. (In re Baldwin-United Corp. Litig.)*, 765 F.2d 343, 349 (2d Cir.1985).

The federal courts of appeals, upon viewing injunctions granted during pandemic tort-bankruptcy cases such as this have consistently understood these circumstances and have endorsed the jurisdiction and utilization of a stay as a case management control mechanism. The Court of Appeals for the Second Circuit in the *Johns-Manville* bankruptcy acknowledged Section 105 as an authorized instrumentality to preclude actions which may "impede the reorganization process." *MacArthur Co. v. Johns-Manville Corp. (In re Johns-Manville Corp.)*, 837 F.2d 89, 93 (2d Cir.), *cert. denied*, 488 U.S. 868, 109 S.Ct. 176, 102 L.Ed.2d 145 (1988). The Court of Appeals for the Fourth Circuit in *A.H. Robins* twice upheld the stay mechanism to thwart actions "which will have an adverse impact on the Debtor's ability to formulate a Chapter 11 plan." *A.H. Robins Co. v. Piccinin (In re A.H. Robins Co.)*, 788 F.2d 994 (4th Cir.), *cert. denied*, 479 U.S. 876, 107 S.Ct. 251, 93 L.Ed.2d 177 (1986); *Oberg v. Aetna Casualty and Surety Co. (In re A.H. Robins)*, 828 F.2d 1023 (4th Cir.1987), *cert. denied*, 485 U.S. 969, 108 S.Ct. 1246, 99 L.Ed.2d 444 (1988). In the latter decision, the Fourth Circuit clearly took the position that the bankruptcy court could stay litigation which would create a "substantial burden

on . . . [the debtor], detract[ing] from the reorganization process." *In re A.H. Robins,* 828 F.2d at 1026. In another asbestos case, the Court of Appeals for the Fifth Circuit affirmed the bankruptcy court's jurisdiction to use Section 105 to stay personal injury suits filed by asbestos workers against debtors, insurers, and executives. *In re Davis,* 730 F.2d 176 (5th Cir.1984).

These decisions reinforce fundamental bankruptcy policy to stop ongoing litigation and to prevent peripheral court decisions from dealing with issues, properties, or entities involved in a debtor's reorganization process without first allowing the bankruptcy court to have an opportunity to review the potential effect on the debtor. Where bankruptcy courts in "mega" cases such as this case are required to deal with complex litigation involving numerous parties, joint and several liability, and multi-million dollars in claims and assets, not to mention potential conflicts with other judicial determinations, the powers of the bankruptcy court under Section 105 must in the initial stage be absolute, unless limited by the Bankruptcy Code or other federal laws. Clearly, the role of Section 105 in this type of case is first to protect the reorganization process.

IV.

As to the utilization of Section 105 vis-a-vis the supersedeas bonds, once the judgment creditor has been successful throughout the appellate process the judgment creditor is not able to proceed against the supersedeas bond without seeking to vacate the Section 105 stay in this Court. Under these circumstances, it will be Debtor's

burden to establish that the Section 105 stay should continue. The Court's inquiry will include Debtor's ability to avoid any final judgment under the Bankruptcy Code and the necessity to protect its sureties or disenfranchise them if such surety agreements can be considered executory contracts or avoided under the avoiding powers in the Bankruptcy Code. (11 U.S.C. §§ 365, 547, and 548.) Additionally, consideration will be given to Debtor's ability to deal with the targeted litigation within the reorganization plan and the effect on that process if the Section 105 stay is extinguished. The analysis may also include the treatment of those judgments which included punitive damages[12] or joint and several liability or contribution with other asbestos co-defendants. This Court does not seek to establish an exhaustive list of inquiry, as each specter of the Section 105 stay may relate differently to an aspect of Debtor's reorganization process which seeks to be protected. At this juncture the Section 105 stay is more analogous to the protection of third parties as provided for in *A.H. Robins* and *Johns-Manville* than it is to some aberration as some would postulate.

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[12] Section 726(a)(4) of the Bankruptcy Code provides that punitive damages are fourth in line for distribution in a Chapter 7 liquidation. Although Section 726(a)(4) is inapplicable to Chapter 11 reorganizations (*In re A.H. Robins Co.,* 89 B.R. 555, 560 (E.D.Va.1988); *In re Alwan Bros.,* 115 B.R. 148, 151 (Bankr.C.D.Ill.1990)), it is well-established that bankruptcy courts have inherent equitable power to disallow, limit, or subordinate claims for punitive damages in Chapter 11 reorganizations. *In re A.H. Robins Co.,* 89 B.R. at 562; *In re Apex Oil Co.,* 118 B.R. 683, 699 (Bankr.E.D.Mo.1990); *In re Johns-Manville Corp.,* 68 B.R. 618, 627 (Bankr.S.D.N.Y.1986), *aff'd,* 78 B.R. 407 (S.D.N.Y.1987).

Accordingly, it is

ORDERED, ADJUDGED AND DECREED that:

1. The supersedeas bond is property of the estate as long as the appellate process upon which it is based is proceeding, and the automatic stay of Section 362 applies to any action to enforce a judgment against the supersedeas bond.

2. Where this Court has granted relief from the stay to complete the appellate proceedings involving Debtor and the appellate process has concluded in favor of the judgment creditor, that judgment creditor is precluded from proceeding against any supersedeas bond without first seeking to vacate the Section 105 stay in this Court.

3. Where at the time of filing the petition, the appellate process between Debtor and the judgment creditor had been concluded, the judgment creditor is precluded from proceeding against any supersedeas bond posted by Debtor without first seeking to vacate the Section 105 stay entered by this Court. It is further

ORDERED, ADJUDGED AND DECREED except as to this Court's orders granting relief from the automatic stay to complete the appellate process, Movants' Motion to Lift Stay with Regard to Celotex Appeals and to Release Supersedeas Bonds Thereon is denied. It is further

ORDERED, ADJUDGED AND DECREED the Section 105 stay entered by this Court on October 17, 1990, continues in effort.

DONE AND ORDERED.

In the Matter of The CELOTEX CORPORATION, et al.,

Debtors.

Bankruptcy Nos. 90-10016-8B1, 90-10017-8B1.

United States Bankruptcy Court,
M.D. Florida,
Tampa Division.

May 29, 1992.

Judgment creditors moved for relief from § 105 stay in Chapter 11 case. The Bankruptcy Court, Thomas E. Baynes, Jr., J., held that § 105 stay would continue during pendency of debtor's formulation of Chapter 11 plan.

Motion denied.

Jeffrey W. Warren, Bush, Ross, Gardner, Warren & Rudy, P.A., Tampa, Fla., for Celotex Corp. et al.

Sara Kistler, Asst. U.S. Trustee.

John W. Kozyak, Kozyak Tropin Throckmorton & Humphreys, P.A., Miami, Fla., for Asbestos Property Damage Claimants Committee.

Charles M. Tatelbaum, Johnson, Blakely, Pope, Boker, Ruppel & Burns, P.A., Tampa, Fla., for Creditors Committee of Unsecured Creditors.

William Knight Zewadski, Trenam, Simmons, Kemker, Scharf, Barkin, Frye & O'Neill, Tampa, Fla., for Unofficial Asbestos Health Claim Co-Defendants Committee.

M. Elizabeth Wall, Honigman Miller Schwartz and Cohn, Tampa, Fla., for Asbestos Health Claimants Committee.

Alani Golanski, New York City, for Angelina O'Brien.

Raymond C. Farfante, Jr., Tampa, Fla., Melvin I. Friedman, New York City, for Mary McCorry and Sylvonnia Stridiron.

Rex Houston, Henderson, Tex., Randy Fabel, for "The King Group" Lloyd and Louan King, et al.

Thomas A. Sweeny, Kansas City, Mo., for William A. Angotti and Isabella Angotti.

Stephen J. Kiely, Salem, Mass., for Mary Gambacorta.

H. Douglas Nichol, Paul T. Gillenwater, Knoxville, Tenn., for Danny Wilburn Berlin.

Joseph D. Shein, Philadelphia, Pa., Suzanne Reilly, for Charles and Julia Rose.

James H. Rion, Jr., Columbia, S.C., J. Michael Papantonio, Pensacola, Fla., for Gordon L. House and Gladys House.

Michael A. Patrick, for Estate of Mark Thomas Hynes.

ORDER ON MOTIONS FOR RELIEF FROM SECTION 105 STAY

THOMAS E. BAYNES, Jr., Bankruptcy Judge.

THIS CAUSE came on for final evidentiary hearing upon several Motions for Relief from the Section 105

Stay.[1] Debtor filed its voluntary petition for relief under Chapter 11 of the Bankruptcy Code (11 U.S.C.) on October 12, 1990. Debtor is a manufacturer of building products. Through the course of merger with, and acquisition of, other corporations, Debtor has been involved in a multitude of lawsuits alleging damage caused by asbestos products sold by it or its predecessors. Prior to filing bankruptcy, Debtor had become the judgment debtor in over 100 asbestos lawsuits[2] and had posted various supersedeas bonds to stay collection of these judgments pending appeals. These bonds were collateralized by millions of dollars of Debtor's property.

Upon the filing of the bankruptcy case, this Court was presented the issue of whether, during the pendency of the asbestos appeals, the supersedeas bonds are property of Debtor's estate. On October 17, 1990, in the initial stages of this case, this Court entered an Order Granting Emergency Motion for Determination of Applicability of § 362 Stay to Pending Matters or, in the Alternative, for

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[1] Motions seeking relief from the Section 105 stay filed by Mary McCorry and Sylvonnia Stridiron; Lloyd and Louan King, et al.; Danny Wilburn Berlin; Angelina O'Brien; William A. and Isabella Angotti; Mary Gambacorta; Gordon L. and Gladys House; the Estate of Mark Thomas Hynes; and Charles and Julia Rose were heard on October 14, 1991, and March 13 and April 25, 1992.

[2] At the time of filing the bankruptcy case, there were over 141,000 lawsuits pending against Debtor and other defendants involving asbestos-related bodily injury claims, asbestos-related property damage claims, and environmental claims. Prepetition Debtor or its insurers had paid out over $361,000,000 to asbestos-related bodily injury claimants.

Extension of § 362 Stay to Pending Matters, which established a Section 105 stay prohibiting all entities from, *inter alia*, proceeding against Debtor or property of Debtor's estate or enforcing against Debtor or property of Debtor's estate any judgment obtained against Debtor. On June 13, 1991, this Court determined the supersedeas bonds were property of Debtor's estate as long as the appellate process for which each bond was posted had not concluded. *In re Celotex Corp.*, 128 B.R. 478 (Bankr.M.D.Fla.1991). *See also Borman v. Raymark Indus.*, 946 F.2d 1031 (3d Cir.1991). If the judgment creditor prevails on appeal, the supersedeas bond would no longer be property of the estate, but would be protected by the Section 105 stay. *See Carter Baron Drilling v. Excel Energy Corp.*, 76 B.R. 172 (D.Colo.1987). At that stage, any judgment creditor wishing to proceed against the supersedeas bond must seek relief from the Section 105 stay. Debtor bears the burden of establishing the Section 105 stay should continue.

The Court's inquiry into whether the Section 105 stay should continue includes, *inter alia*, Debtor's ability to avoid any final judgment under the Bankruptcy Code, the necessity of protecting or disenfranchising Debtor's sureties, Debtor's ability to deal with the asbestos litigation within the reorganization plan and the effect on that process if the Section 105 stay were to be lifted, the treatment of the punitive damage portion of any judgment and the treatment of joint and several liability, contribution, and indemnification from co-defendants in other litigation. *In re Celotex Corp.*, 128 B.R. at 484.

At the hearings Debtor submitted into evidence copies of all insurance policies covering products liability

actions based upon asbestos exposure, copies of settlement agreements between Debtor and various insurers, copies of most of the supersedeas bonds posted by Debtor pre-petition, copies of Movants' final judgments, copies of agreements between Debtor and the bonding companies, and copies of various financial data relating to Debtor.

A party seeking injunctive relief must generally establish (A) likelihood of success on the merits, (B) irreparable harm, (C) threatened harm outweighs possible harm to enjoined party, and (D) minimal harm to the public interest. *Snook v. Trust Co. of Georgia Bank, N.A.*, 909 F.2d 480, 483 (11th Cir.1990). Viewing the continuance of the Section 105 stay under the criteria for obtaining an injunction, the analysis takes the following form:

A. Likelihood of Debtor's success on the merits: Debtor's likelihood of success on the merits should be measured not by Debtor's ability to avoid or subordinate the claims of the judgment creditors or by Debtor's ability to obtain confirmation of a plan, but rather by Debtor's ability to preserve the estate while simultaneously protecting or avoiding the claims of the judgment creditors. This criterion requires Debtor to proceed in a timely fashion to avoid or subordinate the claims of the judgment creditors, formulate a plan of reorganization, and provide adequate protection for those judgment creditors protected by supersedeas bonds. It is clear Debtor has the ability to proceed in such a fashion.

B. Irreparable harm to Debtor: Debtor, in all instances, has collateralized the supersedeas bonds. The

collateral has taken various forms, but one type in particular is illustrative of the linkage associated with irreparable harm. Debtor and many of its insurers on asbestos claims have settled long-ongoing disputes over insurance coverage. Some of these settlement agreements established the maximum amount of insurance coverage, provided for payment to Debtor of these coverage amounts over time, and provided such payments and contract rights could be held by the insurance company as collateral for supersedeas bonds issued on behalf of Debtor in some of the asbestos cases. The supersedeas bonds posted in the *House* and *Hynes* cases fall into this category.

Dissolving the Section 105 stay would merely shift the battleground: if the Section 105 stay were lifted to enable the judgment creditors to reach the sureties, the sureties in turn would seek to lift the Section 105 stay to reach Debtor's collateral, with corresponding actions by Debtor to preserve its rights under the settlement agreements. Such a scenario could completely destroy any chance of resolving the prolonged insurance coverage disputes currently being adjudicated in this Court. The settlement of the insurance coverage disputes with all of Debtor's insurers may well be the linchpin of Debtor's formulation of a feasible plan.[3] Absent the confirmation of a feasible plan, Debtor may be liquidated or cease to

[3] Debtor has brought an adversary proceeding against numerous insurance companies and underwriting syndicates seeking a declaratory judgment concerning the interpretation of the insurance policies and the existence and extent of coverage under those policies for asbestos-related claims and environmental claims asserted against Debtor. *Celotex Corp. v. AIU Insurance Co.* (Adv. No. 91-40).

exist after a carrion feast by the victors in a race to the courthouse.

C. Threatened harm to Debtor outweighs any possible harm to judgment creditors: Movants are correct in their characterization of this dispute as a matter of risk distribution. All things being equal, they say, the risk should be placed on Debtor and its sureties. These judgment creditors have been successful through the completed appellate process and, in a non-bankruptcy context, would be entitled to have their judgments satisfied. Within the bankruptcy context, however, any possible harm to the judgment creditors can be minimized through the establishment of an adequate protection mechanism.

D. Minimal harm to the public interest: There are probably hundreds of thousands of people who have asbestos-related injuries who, but for timing, would have attained the status of judgment creditors protected by supersedeas bonds.[4] If Debtor is not free to formulate a feasible plan, these potential claimants, known or unknown, will be left with little or no recourse.

There are those who went before us. There were feasible plans, applauded by many, and approved by knowledgeable adjudicators. Such have fallen on troubled times. Their feet of clay have been exposed, and like

[4] This group includes any litigant who has not yet obtained a determination upon the merits of his case as well as any person who may have suffered an asbestos-related injury which has not yet manifested itself. Debtor estimates at least 100,000 to 150,000 pre-petition claimants. In addition, consideration for asbestos property damage claims cannot be overlooked.

Ozymandias,[5] their plans may leave little to be observed. With knowledge of the Johns-Manville reorganization[6] and the complexities associated with the A.H. Robins confirmed plan[7], this Court will not put forces into motion which may foster an apocalypse when other timely methods can protect all parties until Debtor's plan can be evaluated by all classes. It is this Court's perception this is why none of the committees in this case have taken up Movants' cause.

Moreover, those sureties protected by the Section 105 stay have yet to exhaust the benefits accruing from their settlement agreements with Debtor. They must participate in the protection of the judgment creditors. Many of them, through their agreements, are obligated to pay Debtor amounts equal to the agreed insurance coverage. Admittedly, the sureties may hold those amounts as secured creditors or may have rights of setoff or recoupment. Nonetheless, their rights may be subject to avoidance, subordination, rejection or modification through the bankruptcy process. They, too, recognize that just the inquiry into such matters along with the dissolution of

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[5] Percy Bysshe Shelley, Ozymandias (1818).

[6] *See Findley v. Blinken (In re Joint E. and S. Dists. Asbestos Litig.)*, 120 B.R. 648 (E. & S.D.N.Y.1990); *Findley v. Blinken (In re Joint E. and S. Dists. Asbestos Litig.)*, 129 B.R. 710 (E. & S.D.N.Y.1991).

[7] *See Menard-Sanford v. Mabey (In re A.H. Robins Co.)*, 880 F.2d 694 (4th Cir.), *cert. denied*, 493 U.S. 959, 110 S.Ct. 376, 107 L.Ed.2d 362 (1989); *Blum v. Unnamed Claimants (In re A.H. Robins Co.)*, 880 F.2d 779 (4th Cir.1989).

the Section 105 stay could transform this case into another *Jarndyce v. Jarndyce.*[8]

Asceticism rather than prophecy should normally be the shibboleth of most matters in bankruptcy. If this Court believed its decision-making were anyway close to a Procrustean solution, it would stop here. However, it is clear the dour countenance of irreparable harm appears before us and portends a resolution which in itself serves the public interest.

Considering the evidence, the record, and the argument of counsel, this Court finds there is sufficient evidence to support the continuation of the Section 105 stay. This determination is predicated upon several factors. First, if the Section 105 stay were terminated, there would be an avalanche of litigation by various bond sureties seeking to proceed against Debtor's collateral supporting those supersedeas bonds because the judgment creditors would be free to go against those bonds. This Court would be faced with the same complex scenario of balancing the interests of Debtor's survival in bankruptcy and the protection of the property of the estate vis-a-vis the rights of the bond sureties. This balance can be struck more equitably by protecting the judgment creditors at the same level as when the bankruptcy was filed. Continuation of the Section 105 stay benefits not only debtor but all creditors, including numerous asbestos claimants who have not yet obtained judgments. The judgment creditors' claims are capable of being considered within the Chapter 11 plan. A Chapter 11 plan may be able to alter the

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[8] Charles Dickens, Bleak House (1853).

immediate collection rights of the bond sureties, thus preserving the collateral for other, as yet unknown, creditors. Such an alteration of interests may be acceptable to many sureties who are also involved as Debtor's insurers on asbestos claims.

Second, the judgment creditors, while having unique status within a bankruptcy context, are not impaired where their positions during the bankruptcy case are not eroded and their treatment under the plan provides for a separate classification of their claims. It would appear these judgment creditors' claims would be allowed secured claims upon the completion of the appellate process, especially since this Court does not have jurisdiction to consider any objections to their claims unless liquidated. Once the claims are liquidated, any court may, *inter alia*, be limited by the doctrine of issue or claims preclusion.[9] Avoidance or subordination of Movants' rights appear to be the only potential avenues for Debtor.[10]

Third, consideration must be given to the numerous other asbestos claimants who do not have the advantage of having judgments or supersedeas bonds to protect their claims during the bankruptcy. This potentially large number of known and unknown asbestos claimants will

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[9] *See, e.g., In re Standard Insulations, Inc.*, 138 B.R. 947 (Bankr.W.D.Mo.1992).

[10] *See, e.g., Novak v. Callahan (In re GAC Corp.)*, 681 F.2d 1295 (11th Cir.1982); *In re A.H. Robins Co.*, 89 B.R. 555 (E.D.Va.1988); *In re Apex Oil Co.*, 118 B.R. 683 (Bankr.E.D.Mo.1990); *In re Johns-Manville Corp.*, 68 B.R. 618 (Bankr.S.D.N.Y.1986), *aff'd*, 78 B.R. 407 (S.D.N.Y.1987).

have to be dealt with by Debtor in its plan. The history of similar bankruptcy cases and their proposed solutions to these problems has acquainted us with the uncertainty of those solutions. This Debtor, like any other similarly situated debtor, cannot afford any inappropriate resolution of such claims. Debtor's quest to formulate a comprehensive, durable solution will best be conducted in an environment unfettered by multiple attacks on its collateral or successive disputes presented to this Court for resolution. Such protection, however, requires Debtor to give adequate protection to the judgment creditors.

Accordingly, it is

ORDERED, ADJUDGED AND DECREED that the Motions for Relief from the Section 105 Stay are denied on the following conditions:

1. Within 30 days of the entry of this Order, Debtor shall provide the Court with a report listing all judgment creditors protected by supersedeas bonds, the amount of each judgment, the amount of each supersedeas bond, the surety for each bond, and the collateral for each bond.

2. Debtor shall set out in the report whether any supersedeas bond protecting any judgment was insufficient, as of the date of filing the petition, to cover the judgment amount and interest allowed by law.

3. If any supersedeas bond is insufficient or will become insufficient to protect completely any judgment affirmed on appeal through confirmation of the plan, Debtor, within 30 days of filing the report, shall create an interest-bearing reserve account or increase the face amount of any supersedeas bond to cover the full amount

of any judgment through confirmation. Such reserve account, if established, shall be disbursed only upon order of this Court.

4. Notwithstanding Debtor's obligation, any surety of Debtor whose collateral is capable of bearing interest shall establish an escrow account which bears interest at the highest prevailing rate allowed by law. In no case, however, shall the supersedeas bond, or subsequent protection under this Order, be less than the amount of the judgment plus interest. The Court reserves jurisdiction to determine whether the interest accruing in the escrow account shall be for the benefit of the judgment creditors, the surety, or Debtor. No funds shall be disbursed from such escrow account without order of this Court.

5. Debtor shall classify any claim of judgment creditors whose judgments are protected by supersedeas bonds in a separate class in its Chapter 11 plan. Notwithstanding the classification, Debtor shall provide for such creditors' allowed claims to be paid in full unless otherwise agreed by the judgment creditor, individually, or determined by this Court. It is further

ORDERED, ADJUDGED AND DECREED that Debtor shall file any preference action or any fraudulent transfer action or any other action to avoid or subordinate any judgment creditor's claim against any judgment creditor or against any surety on any supersedeas bond within 60 days of the entry of this Order

DONE AND ORDERED.

Daniel A. WILLIS; Carolyn W. Willis; Herman L. Mensing, Jr.; Frances K. Mensing; Vincent H. Lewis; Ruby B. Lewis; Elwood F. Hamlet; Lois D. Hamlet, Plaintiffs-Appellees,

and

Richard L. Taylor; Mary S. Taylor; William F. Cobb; Lillie P. Cobb; Roy B. Bass; Susan R. Bass, Plaintiffs,

v.

The CELOTEX CORPORATION,
Defendant-Appellant,

and

Owens-Corning Fiberglass Corporation; Eagle-Picher Industries, Inc.; Armstrong World Industries, Inc.; Gaf Corporation; Keene Corporation; Standard Insulations, Inc.; Raymark Industries, Inc.; Owens-Illinois, Inc.; H.K. Porter Company, Inc.; Fibreboard Corporation; Crown Cork & Seal Company, Inc.; Combustion Engineering, Inc.; Pittsburgh Corning Corporation, Defendants.

No. 91-1446.

United States Court of Appeals,
Fourth Circuit.

Argued Oct. 28, 1991.

Decided Oct. 22, 1992.

Creditors who obtained prepetition judgment for asbestos-related injuries moved for release of supersedeas bond posted pending appeal. The United States District Court for the Eastern District of Virginia, John A.

MacKenzie, Senior District Judge, granted motion, rejecting Chapter 11 debtor's claim that bond was part of estate. On rehearing, the Court of Appeals, Wilkins, Circuit Judge, held that bankruptcy court had authority to enjoin execution on supersedeas bonds posted to secure asbestos-related judgments against debtor.

Vacated and remanded.

Jeffrey Wayne Warren, Bush, Ross, Gardner, Warren & Rudy, P.A., Tampa, Fla., argued (Wendy V.E. England, on brief), for defendant-appellant.

Brent Marcus Rosenthal, Baron & Budd, P.C., Dallas, Tex., argued (Jonathan A. Smith-George, Patten, Wornom & Watkins, Newport News, Va., on brief), for plaintiffs-appellees.

Before RUSSELL and WILKINS, Circuit Judges, and WARD, Senior United States District Judge for the Middle District of North Carolina, sitting by designation.

OPINION

WILKINS, Circuit Judge:

The Celotex Corporation (Celotex) appeals an order of the district court directing The Aetna Casualty & Surety Company (Aetna) to perform as surety on a supersedeas bond posted by Celotex to secure, pending appeal, the payment of judgments entered by the district court against Celotex following a jury verdict in favor of the plaintiffs (Willis). Celotex maintains that the district court erred in permitting execution against Aetna because proceedings to enforce payment against the surety on the

bond were stayed following Celotex's Chapter 11 bankruptcy filing under the automatic stay provisions of 11 U.S.C.A. § 362(a)(1), (3) (West Supp.1992) or, alternatively, under an order of the United States Bankruptcy Court for the Middle District of Florida entered in Celotex's bankruptcy proceedings pursuant to 11 U.S.C.A. § 105(a) (West Supp.1992). The extraordinary facts presented by the Celotex bankruptcy lead us to conclude that the stay of proceedings against third-party sureties to enforce payment on supersedeas bonds by the bankruptcy court was a proper exercise of its authority under § 105(a). Consequently, we vacate the order of the district court and remand for further proceedings at such time as the bankruptcy court lifts the stay.

I.

In February 1989, the United States District Court for the Eastern District of Virginia entered amended judgments totalling $526,500 in favor of Willis and against Celotex for Willis' asbestos-related injuries. Celotex posted a supersedeas bond in the amount of $600,000, with Aetna serving as surety on the bond, to stay execution of the judgments pending Celotex's appeal.[1] *See* Fed.R.Civ. 62(d). To obtain Aetna's participation as surety, Celotex purchased certificates of deposit that it pledged to First Florida Bank, N.A. The bank then issued

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[1] At oral argument we requested information concerning the structure of the financial arrangements between Celotex and Aetna. Willis subsequently moved to strike Celotex's response to our request. This motion is denied.

an irrevocable letter of credit[2] in favor of Aetna upon which Aetna could draw in the event it was required to pay on the supersedeas bond.[3]

This court affirmed the judgments against Celotex in June 1990, and our mandate issued on October 3, 1990. Nine days later Celotex and its wholly-owned subsidiary filed petitions for relief under Chapter 11 of the Bankruptcy Code, *see* 11 U.S.C.A. § 1101, *et seq.* (West 1979 & Supp.1992), in the United States Bankruptcy Court for the Middle District of Florida. On October 17, 1990, the bankruptcy court entered an order seeking to augment the automatic stay protection afforded to Celotex under § 362(a) and "precluding, among other things, judgment creditors from proceeding in various state and federal courts against supersedeas bonds" posted by Celotex

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[2] This financial arrangement appears to be relatively common. *See, e.g., Olympia Equip. Leasing Co. v. Western Union Tel. Co.*, 786 F.2d 794, 800-03 (7th Cir.1986) (Easterbrook, J., concurring); *see generally Cargill, Inc. v. Sunlight Foods, Inc.*, 586 So.2d 366, 367-68 (Fla.Dist.Ct. App.1991).

[3] If Aetna were to satisfy Willis' judgments, it could not do so with Celotex's assets because it does not hold Celotex's assets. Instead, it would compensate Willis with its own funds, then immediately draw on the irrevocable letter of credit. Section 362 would not stay Aetna from proceeding against the letter of credit. The letter of credit issued by the bank and its proceeds are not part of Celotex's bankruptcy estate, and the obligation of the bank under the irrevocable letter of credit is completely independent of any obligations between Aetna and Celotex. *See Southmark Corp. v. Riddle (In re Southmark Corp.)*, 138 B.R. 820, 828 (Bankr.N.D.Tex.1992); *Kellogg v. Blue Quail Energy, Inc. (In re Compton Corp.)*, 831 F.2d 586, 589-90 (1987), *reh'g on other grounds*, 835 F.2d 584 (5th Cir.1988); *In re M.J. Sales & Distrib. Co.*, 25 B.R. 608, 614 (Bankr.S.D.N.Y.1982).

without the approval of the bankruptcy court. *In re Celotex Corp.*, 128 B.R. 478, 482 (Bankr.M.D.Fla.1991).

On October 26, 1990, Willis informed the district court that Celotex had not paid the judgments and sought to execute against Aetna as surety on the supersedeas bond. *See* Fed.R.Civ.P. 65.1. Relying primarily upon *Mid-Jersey Nat'l Bank v. Fidelity-Mortgage Investors*, 518 F.2d 640, 643-44 (3d Cir.1975), the district court determined that the supersedeas bond was not part of the Celotex bankruptcy estate over which the bankruptcy court possessed exclusive jurisdiction and, consequently, ordered the proceeds of the supersedeas bond disbursed to Willis. Celotex appeals this decision.

II.

Celotex contends that 11 U.S.C.A. § 362(a)(1) and (3)[4] stayed proceedings against Aetna because it has an identity of interest with Celotex such that a proceeding against Aetna is, in effect, a proceeding against Celotex,

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[4] This section provides in pertinent part:

> [A] petition filed under [Chapter 11] . . . operates as a stay, applicable to all entities, of – (1) the commencement or continuation . . . of a judicial . . . proceeding against the debtor that was . . . commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;
>
> . . . .
>
> (3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate.

11 U.S.C.A. § 362(a)(1), (3).

see A.H. Robins Co. v. Piccinin (In re A.H. Robins Co.), 788 F.2d 994, 999-1002 (4th Cir.), *cert. denied*, 479 U.S. 876, 107 S.Ct. 251, 93 L.Ed.2d 177 (1986), and because the supersedeas bond is an asset of the bankruptcy estate. These arguments lack merit.

The terms of the supersedeas bond impose a duty on Aetna separate from and independent of Celotex's duty to pay the judgments. Aetna does not hold an identity of interest with Celotex. *See Washburn & Kemp, PC v. Committee of Dalkon Shield Claimants (In re A.H. Robins Co.)*, 846 F.2d 267, 271 (4th Cir.1988) (distinguishing *Piccinin* and holding that unique circumstances essential to make a § 362(a) stay effective as to a third party do not exist if outsider third party owes independent contractual duty to creditor). Proceedings against Aetna as surety on the supersedeas bond, therefore, were not stayed under § 362(a)(1).

This court has not previously addressed whether a supersedeas bond is an asset of the bankruptcy estate. While there is considerable disagreement concerning this issue, *see In re Southmark Corp.*, 138 B.R. at 827-28; *compare Mid-Jersey Nat'l Bank*, 518 F.2d at 643-44 *with Borman v. Raymark Indus., Inc.*, 946 F.2d 1031, 1032-36 (3d Cir.1991), we need not address this question. Assuming a supersedeas bond is an asset of the bankruptcy estate during the pendency of an appeal, here the appeal was decided unfavorably to Celotex and our mandate issued prior to Celotex's bankruptcy filing, thus extinguishing any interest Celotex may have had in the bond. Accordingly, proceedings against the bond were not proceedings "to obtain possession of property of the estate" and were not stayed by § 362(a)(3). 11 U.S.C.A. § 362(a)(3).

III.

Next we consider whether the order of the bankruptcy court properly stayed execution against the surety of the supersedeas bond pursuant to 11 U.S.C.A. § 105(a). This section permits the bankruptcy court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C.A. § 105(a). We have held that a bankruptcy court may properly exercise its authority under § 105(a) to enjoin an action against a third party when the court finds " 'that failure to enjoin would effect [sic] the bankruptcy estate and would adversely or detrimentally influence and pressure the debtor through the third party.' " *Piccinin*, 788 F.2d at 1003 (quoting *Otero Mills, Inc. v. Security Bank & Trust (In re Otero Mills, Inc.)*, 25 B.R. 1018, 1020 (D.N.M. 1982)). Additionally, the bankruptcy court may " 'enjoin a variety of proceedings . . . which will have an adverse impact on the Debtor's ability to formulate a Chapter 11 plan.' " *Id.* (quoting *Johns-Manville Corp. v. Asbestos Litigation Group (In re Johns-Manville Corp.)*, 40 B.R. 219, 226 (S.D.N.Y.1984)).

In support of the § 105(a) order, the bankruptcy court detailed the magnitude of the task it faced in attempting to oversee the bankruptcy proceedings, resulting from the sheer number of pending personal injury cases in which supersedeas bonds had been posted. *In re Celotex Corp.*, 128 B.R. 478, 482-83 (Bankr.M.D.Fla.1991). As of the bankruptcy filing, over 141,000 asbestos-related personal injury actions were pending against Celotex in federal and state jurisdictions nationwide; because at least 100 such cases were then on appeal, Celotex had posted supersedeas bonds totalling nearly $70 million to stay

execution of the judgments pending conclusion of the appellate processes. *Id.* Stressing that its power in the initial stages of the bankruptcy filing to deal with this complex litigation must be absolute, and noting that an opportunity to evaluate the underlying tort judgments secured by the supersedeas bonds to ascertain whether any portion of the judgments were voidable would be required, the bankruptcy court concluded that a race to the courthouse by those insured by supersedeas bonds would impose a burden on the reorganization process. *Id.* at 483-84. The court made clear, however, that once a judgment creditor had successfully completed the appellate process, the propriety of lifting the stay of proceedings against the supersedeas bonds would be reexamined. *Id.* at 484.[5]

While in the usual bankruptcy filing, third-party payments on a supersedeas bond securing a judgment owed by the bankrupt would not affect reorganization, Celotex's is not the usual bankruptcy. We agree with the bankruptcy court that immediate execution against sureties on the supersedeas bonds would have been detrimental to Celotex's ability to formulate a plan of reorganization. A hiatus from execution on the bonds was necessary to permit the bankruptcy court to take control of the immense litigation and to examine the underlying tort judgments to establish whether any portion of the awards was voidable. Consequently, the bankruptcy

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[5] Because Willis has already successfully completed the appellate process, we assume that once the bankruptcy court has had an opportunity to evaluate whether any portion of Willis' judgment is voidable, it will lift the stay.

court did not act improperly in enjoining execution on supersedeas bonds posted to secure judgments against Celotex under § 105(a). Thus, we vacate the order of the district court and remand for further proceedings at such time as the bankruptcy court lifts the § 105(a) stay.

VACATED AND REMANDED.